



JUDICIARY

5

IN THE MALAWI SUPREME COURT OF APPEAL

Criminal Appeal No 5 of 2017

10

(Being Case Management Case No SCBT-SCCRAP-49)

BETWEEN

MACDONALD KUMWEMBE

1ST APPELLANT

AND

PIKA MANONDO

2ND APPELLANT

15

AND

REPUBLIC

RESPONDENT

Criminal Appeal No 6 of 2017

(Being Case Management Case No SCBT-SCCRAP-49)

BETWEEN

20

RAPHAEL KASAMBALA

APPELLANT

AND

REPUBLIC

RESPONDENT

Recusal – bias – proof – applicant must establish conduct pointing to bias

Bias – conduct – must be immediate to influence decision – the longer the period between the conduct and the decision, the weaker, everything being equal

Bias – proof – the court must look at the conduct, in space and time, as a whole

5 *Bias – conduct – intervening act – may affect impartiality*

Bias – subjective and objective test

Bias – objective test – the impression of a fair-minded and informed observer

10 *Fair-minded observer – always reserves judgement – is not unduly sensitive or suspicious – is not complacent – knows that fairness requires a judge must be and seen to be unbiased – not shrink from the conclusion that things said or done or associations formed may make it difficult to judge impartially – appreciate context forms important part before passing judgment*

Informed observer – takes a balanced approach to any information given – takes trouble to inform oneself on all relevant matters

Bias – proof – standard – real possibility of bias

15 *Bias – conduct not basis for bias – judges previous judicial decisions or extracurricular utterances – extra-judicial, intra-judicial statements, judicial precedents – objections based on ethnicity, religion, national origin, gender, age, class, means or sexual orientation of a judge – judge’s social, education, service, employment, background, history, previous political association, membership of a sporting, charitable or social bodies, Masonic association, previous judicial decisions, extracurricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers)*

20 *Bias – conduct basis of bias – personal friendship or animosity – closely acquainted with a party involved and credibility of the party is significant in the decision of the case – rejecting the person’s evidence as to throw doubt on his ability to approach such evidence with open mind on later occasion – expressing a view on a question at issue in the proceeding as to throw doubt on his ability to try the issue with an objective mind – doubting ability to ignore extraneous considerations, prejudices and predilections*

Extrajudicial statements, Intra-judicial pronouncements or judicial pronouncements – not, without more, a basis for recusal

Extrajudicial statements, intra-judicial pronouncements – with moderation, no basis for recusal

25 *Extrajudicial statements, intra-judicial statements – statements or pronouncements in tones or language that undermine impartiality – basis for recusal*

Code of Conduct – Judiciary – extracurricular comments – judge has a right to express opinion on legal matters, specific or general in many media

Code of Conduct – pending and impending proceedings – a judge cannot comment

Legislation

30 **Legislation**

Code of Conduct of Judicial Officers in Malawi Rule 4 (2)

Constitution Sections 9; 10; 11 (2); 42 (2)

Criminal Procedure and Evidence Code, Section 355 (1)

Supreme Court of Appeal Act Section 24 (1)

35 **Bangalore United Nations Basic Principles of Judicial Independence**

Values 1, 2 and 3

Cases

Attorney General v Chipeta (1994) Miscellaneous Civil Application No 33 (MSCA) (unreported);

Auckland Casino Ltd v Casino Control Authority [1995] 1 N.Z.L.R 142)

40 *Bienstein v Bienstein* [2003] H.C.A. 7 at [35]-[36];

Blackford v Macleod (1986) SLT 444

BTR Industries South Africa (PTY) Ltd v Metal and Allies Workers’ Union (1992 (3) SA 673

- Chihana v Republic*, MSCA Case No 9 of 1992
- Clenae Properties Ltd and others v Australia and New Zealand Banking Group* [VSCA] 35 (Supreme Court of Victoria).
- Cline v Sawyer* 600 P. 2d 725 at 729 (SC, Wyoming, 1979);
- Dimes v The Proprietors of the Grand Junction Canal* [1852] 3 H.L. 759
- 5 *Doherty v. Macglennan* 1997 S.L.T. 444
- Ebner v Official Trustees* [2000] H C A 63)
- Haulschildt v Denmark* (Series No 154 (1989)
- Helow v Secretary of State for the Home Department and another* (2008 UKHL 62)
- Hoekstra and others v Her Majesty's Advocate* [2000] Scot HC 32, (14th March 2000)
- 10 *Idoport Pty Ltd v National Australia Bank Ltd* [2004] N S W S C 270
- In re Medicaments and Related Classes of Cases No 2* [2001] 1 WLR 700
- In re Republic v Kadwa and section 42 (2) (f) of the Constitution and the Criminal Procedure and evidence Code* (2006) Miscellaneous Civil Application No 2005 (HCM) (PR) (unreported),
- Johnson v Johnson* (2000) 201 CLR 488
- 15 *Kasambala v Republic* (2017), Miscellaneous Criminal Application No 5
- KFCTIC v Icori Estero SpA* (Court of Appeal of Paris, 28 June, 1991, International Arbitration Report, Vol. 6#8 8/91
- Kumuwa and others v Republic* (2012) Bail Application Case No 107 (MHC) (PR)
- Kumwembe and others v Republic* (2013) Criminal Case No 65 (MHC) (LR) (unreported)
- Kusowa v Republic*, (2015) Criminal Appeal No 9 (MSCA) (unreported)
- 20 *Law v. Chattered Institute of Patent Agents* [1919] 2 CH 276
- Lawal v Northern Spirit Ltd* UKHL (35, [2003] ICR 856 [2004] 1 All ER 187
- Letasi v Republic* (2016) Criminal Appeal No 13 (MSCA) (unreported)
- Livesey v The New South Wales Bar Association* (1983) 151 CLR 288)
- Locabail (UK) Ltd Bayfield Properties Ltd; Re JRL, Ex p. CJL* (1986) 161 C.L.R. 342, p. 352;
- 25 *Locabail (UK) Ltd v Bayfield Properties Ltd and another* [1999] EWCA 3004
- Locabail Ltd v Bayfield Properties* [2001] 1 All ER 65.
- Makiseni v Republic* (2015) Criminal Appeal No 14 (unreported)
- Montgomery and Coulter v Her Majesty's Advocate No 2* (16 November, 1999)
- Nicholas v Alley* 71 F. 3d. 347 at 351 (10th Cir. 1995);
- 30 *Piersack v Belgium* (Series No 3 (1982)
- President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147
- President of the Republic of South Africa v South African Rugby Football Union* 1999(4) S.A. 147 at [148] (Constitutional Court);
- R v Bow Street Metropolitan Stipendiary Magistrate (No 2)* [1992] 2 WLR 272
- R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR. 272.
- 35 *R v Camborne Justices, ex parte Pearce* [1955] 1 Q.B. 41
- R v Gough* [1993] A.C. 646
- R v Inner West London Coroner, ex parte Dallaglio* [1994] 4 All E.R. 139

R v Rand (1886) LR I Q.B. 230

R v S (RD) (1997) 3 SCR 484

R v Watton (1979) 68 Cr App R 293

Re Drexel Burnham Lambert Inc 861 F. 2d 1307 at 1312 (2nd Cir. 1988);

5 *Robbie the Pict v HM Advocate* [2002] Scott.H.C. 333;

SACCAWU v Irvin & Johnson, 2000 (3) S.A 705 at [13] (Constitutional Court); *Liljeberg v Health Services Acquisition Corp* 486 U.S. 847, P871; *Laird v Tatum* 409 U S 824 (SC, 1972)

Simonson v General Motors Corp 435 F. Supp 574 at 578 (USDC, pa., 1976);

10 *State v The State President of Malawi and others, ex parte The Council of the University of Malawi* (2011) Civil Appeal No 41 (MSCA) (unreported), *American Cyanamid Co. v Ethicon Ltd.*, [1975] 1 All ER 504

Suleman v Republic, [2004] MLR 398

Tembo and others v Director of Public Prosecution, MSCA Criminal Appeal No. 11 of 2004 (unreported)

Vakaatu v Kelly (1989) 167 C L R 568).

Webb v R (1994) 181 CLR 41)

15 *Yiannakis -v- Rep.* (1994) Misc. Criminal Application No. 9 (MHC) (PR) (unreported) *Sumuka Enterprise v African Business Association* [1981-83] 10 MLR 269;

Textbooks

20 DMC-ADMIN, 'Law Review article not ground for recusal,' *Wisconsin Law Journal*, March 1, 2010

HEATON, 'Bias and previous determinations: four recent decisions in the Court of Appeal and Privy Council,' *Civil Justice Quarterly*, 2015

HIGGINS, 'BATAS v Laurie: Apprehended Bias and Actual Failure of Case Management,' 2011 (30) *Civil Quarterly Review*, 246,

NEUBERGER, 'Judge not, that ye be not judged,' *judging judge decision-making*, F A Mann Lectures, 2015, Lord Neuberger

OLOFOFOYE, A. A. 'Subjective objectivity: judicial impartiality and social intercourse in the US Supreme Court,' 2006, *Public Law*)

25 **Words and phrases**

Impartiality

Bias

Natural judge

30 **CORAM: D F MWAUNGULU, JA**

Chipeta, for the first and second appellant in Criminal Appeal Case No 5 of 2017

Msisha, SC, Gondwe, Cipembere, for the appellant in Criminal Appeal No 6 of 2017

Kachale, the Director of Public Prosecutions, Chibwana, Malunda, Senior Assistant Chief State Advocate and Chilcankheni, Senior State Advocate

35 **Mwaungulu, JA**

JUDGEMENT

Precis

There cannot be any doubt, based on section 9 of the Constitution, the judicial oath and rule 3C of the Code of Conduct of Judicial Officers in Malawi and the Bangalore United Nations Basic Principles of Judicial Independence (Values 1, 2 and 3) independence, of my duty to independence and impartiality when ascertaining facts and applying law, to be rid of bias, prejudice or predilections. This is a longstanding common law notion. That duty, as the flattery from the Director of Public Prosecution beyond measure lavished, I, like all judicial officers, have discharged. Where, however, there is a real possibility of bias, there is a compelling duty to recuse – but only where there is an appearance (from the viewpoint of a fair-minded and informed observer) of bias. What concerns is the confidence which courts in a democratic society must inspire in the public and the parties.

The Director of Public Prosecution, however, never proved conduct on which to base bias. Assuming the Director of Public Prosecutions did, the conduct never amounts to one on which a judge's impartiality is questioned and on which a judge should recuse. Moreover, the comments the Director of Public Prosecution relies on are so remote in space and time – seven months after. Additionally, this Court on 16 October, 2016 delivered its judgment in *Kusowa v Republic*, (2015) Criminal Appeal No 9 (MSCA) (unreported) after comments in the Malawi Law Society Google Group. That decision was not referred to the full court. On the admission of the Director of Public Prosecution, on 17 January, 2017, the Director of Public Prosecution represented, this court delivered the judgment in *Letasi v Republic* (2016) Criminal Appeal No 13 (MSCA) (unreported). The Director of Public Prosecutions, three months on, never referred the matter to the full court. There was, therefore, acceptance of the decisions of this court which, being the latest, bind the court below and, unless reconsidered, bind this court – and me, by extension. Consequently, in deciding the matter today, this court would be influenced by these decisions – not comments made, now seven months, which have been superseded by clear judicial precedents which – on analysis – go beyond comments made on the Malawi Law Society Google Group from 10 June, 2016, well before *Kumwembe and others v Republic* (2013) Criminal Case No 65 (MHC) (LR) (unreported).

The evidence the Director of Public Prosecution garnered from the Malawi Law Society Google Group does not show that I or the rest of the contributors commented on or discussed *Kumwembe and others v Republic* – or *Kasambala v Republic* (2013) Miscellaneous Criminal Appeal No 5 (MSCA) (unreported) – at all. The evidence the Director of Public Prosecution – the Director of Public Prosecution acknowledged *Makiseni v Republic* (2015) Criminal Appeal No 14 (MSCA) (unreported) – garnered from the Malawi Law Society Google Group actually shows that my comment and indeed the comments of contributors concerned what another commentator dubbed 'the Mwaungulu approach,' namely, that the overarching principle when granting bail pending appeal is the interests of justice.

The evidence actually shows that from 04 October, 2016: 14:54, when Dr Sunduzwayo Madise lodged *Kumwembe and others v Republic* on the Malawi Society Google Group up to the last comment on Wednesday, 19 October, 2016 at 6:00 pm, nobody, as in everybody, ever, as in never, mentioned or discussed *Kumwembe and others v Republic*, let alone *Kasambala v Republic* at all. The Director of Public Prosecution never laid evidence and, therefore, never proved her assertion that I or any contributor discussed or commented on *Kumwembe and others v Republic*, let alone *Kasambala v Republic*. The discussion started when Mr Trevor Chimimba lauded the Mwaungulu approach – the interest of justice approach. For a fortnight members, without my intervention, debated this approach – not *Kumwembe and others v Republic* or its holding. My first comment deals with this approach – not *Kumwembe and others v Republic* and so is every commentator and comment.

The application

Since neither I nor contributors on the Malawi Law Society Google Group commented on *Kumwembe and others v Republic*, let alone *Kasambala v Republic*, properly understood, the Director of Public Prosecutions wants recusal because, acting *ex cathedra*, in a series of decisions in this court and in the court below, I decided that, after conviction, bail, based on section 9 of the Constitution, will be granted in the interests of justice. In coming to that conclusion, I reviewed section 9 of the Constitution, section 24 (1) of the Supreme Court of Appeal Act, section 351 (1) of the Criminal Procedure and Evidence Code, decisions of this court and the court below and internationally decided cases. Chiefly, section 42 (2) (f) of the Constitution that provides citizens of the right to release – on bail – is not restricted to before conviction. The right inures to an accused person. An accused person, section 42 (2) (f) (ii) of the Constitution, read as a whole, includes a person convicted of a crime.

Facts

The Director of Public Prosecution pressed the application on an impression she wants to create and propagates that I and other members of the Malawi Law Society Google Group commented on *Republic v Kumwembe and another*. From the nature of the application, I cannot have to offer evidence to contradict the Director of Public Prosecutions introduced (*Laird v Tatum* 409 U S 824 (SC, 1972; *Idoport Pty Ltd v National Australia Bank Ltd* [2004] N S W S C 270, *Ebner v Official Trustees* [2000] H C A 63). The application, therefore, can only base on evidence the Director of Public Prosecution evinces in Mr Chibwana's affidavit.

Albeit, the thread for discussion is *Kumwembe and others v Republic*, nowhere does the affidavit show where I or other contributors commented on *Kumwembe and others v Republic*. On the contrary, the affidavit shows that I and other contributors never commented on *Kumwembe and others v Republic* at all. All of us commented on a subject discussed all along up to that point and which was the reason why *Kumwembe and others v Republic* – as precedent – was introduced on the forum for discussion, the point that bail pending appeal proceeds on interests of justice. Mr Chibwana, in the affidavit he made for the Director of Public Prosecution, concedes as much:

That the comments on the *Kumwembe* case (supra) are not the sole occasion upon which Honourable Mwaungulu, JA, SC, has commented on the matter of bail pending appeal. The Honourable Justice of Appeal has commented at length on several exchanges on the issue, including commenting on a judgment of a fellow justice of appeal in the case of *Makiseni v Republic*, copies of which I exhibit hereto and mark as EXC4 [emphasis supplied]

The Director of Public Prosecution, therefore, in her affidavit concedes that I and other contributors only commented on bail law – not *Kumwembe and others v Republic*. That it is my views on bail pending appeal – not *Kumwembe and others v Republic* – that are basis of this application is seen in this conspicuous complaint:

That an analysis of the Appellant’s skeletal arguments demonstrates that they have essentially cited the decisions of the Honourable Justice’s decisions in support of their arguments.

It is these decisions – and my review of them - that are a pretext for this application. Mr Chibwana’s affidavit sums the gist for the application for recusal:

That as a result of the Honourable Court’s comment on the aforementioned matter [bail pending appeal], which demonstrated that the Honourable Justice of Appeal firmly believes in the superiority of its positions, as compared to all other judges who have adjudicated on the matter, the state submits that for the Honourable Justice of Appeal to preside on the present matter, when there has been demonstrated bias, would be contrary to the interests of justice [parenthesis supplied].

In passing, it sounds odd, really, that a judge should recuse based on Counsel’s conception or misconception that the judge was exhibiting an aura of superiority over other judges. The comments actually create no such candour. The Director of Public Prosecution completely misunderstood the tenor of the comments. That misconstruction cannot be used for requiring a judge to recuse.

Facts

It is necessary, therefore, right at the beginning, to disgorge facts from fiction. There are five factual aspects to expose: comments on *Kumwembe and others v Republic*; comments on *Makiseni v Republic*, this Court’s decision in *Kusowa v Republic*; this Court’s decision in *Letasi v Republic*; and this Court’s comments on *Kumwembe and others v Republic* in *Letasi v Republic*. Mr Chibwana exhibited all comments and contributors on the thread. Those comments show that there was no comment on *Kumwembe and others v Republic*, let alone *Kasambala v Republic*. All commentators – including me – focused on the principle that I discussed in previous cases and discussed many times before these comments, that on bail pending appeal a court must consider all the circumstances of the case and bail will be granted in the interests of justice.

Mr Chibwana affidavit shows that it is not even me but Mr Chimimba who raised – a different point of discussion distinct from *Kumwembe and others v Republic* – the topic anew, the Mwaungulu approach. Since, reading all the exhibits, there is no evidence that in the Malawi Law Society Google Group I and other contributors ever commented on *Kumwembe and another v Republic*, let alone *Kasambala v Republic* and since all of us commented on the principle that a court must examine all the circumstances of the case and grant bail in the interests of justice, it is necessary to, as far as possible, consider all the contributors and comments and investigate, where necessary, issues all contributors commented on.

Dr Sunduzwayo Madise posted the case of *Kumwembe and others v Republic* on the Malawi Law Society Google Group on 4 October, 2016: 14:54. Nobody comments on the case – precisely because there is nothing new in it – for two days. The first contributor is Mr Trevor Chimimba on 6 October, 2016 at 20:20:

Sundu,

“Don’t they say the law is as ass...how do we expect a judge who has convicted folks to grant bail on the exceptional likelihood that the convict would succeed on appeal?”

If you ask me the Mwaungulu approach has a lot of merit. In these parts bail pending appeal is routine and in New York we have had high profile corruption cases”

It is necessary to examine this contribution profusely. There is – and this continues throughout the comments – no reference to *Kumwembe and others v Republic* in Mr Chimimba’s seminal contribution. There is no evidence – from the affidavit – that *Kumwembe and others v Republic* discussed the Mwaungulu approach. Assuming it did, the comment from Mr Chimimba does not discuss the facts or the reasoning in *Kumwembe and others v Republic* case. From now on all commentators focus on considering the interests of justice on bail pending appeal. The Mwaungulu approach – almost like a different and distinct thread – develops independently. Mr Chimimba does not even mention *Kumwembe and others v Republic*. He starts a different discussion – the Mwaungulu approach. This is something different from the case that Dr Madise put on the Malawi Law Society Google Group.

The next contributor is Mr Theu on Thursday, October 6, 2016, 12:37. He does not mention nor discuss *Kumwembe and others v Republic*. He discusses the Mwaungulu approach:

Now Trev

“It is troubling when the assertion that the “Mwaungulu approach has a lot of merit” is immediately followed by “in these parts bail pending appeal is routine”. One cannot help but think that you are attempting to make out the merit by reference to what is happening in those parts.

For my part, I cannot see any merit in a routine grant of bail to convicts sentenced to a term in jail on due process. None whatsoever, the norm is that if you have been sentenced to term in

prison, by law you have to be in prison. You have to make out a case to except yourself from that norm – exceptional circumstances. And nay, our constitution does not pass for a scapegoat on the point”.

5 Dr Madise contribution is on Friday, October 7, 2016, 03:43. He introduced *Kumwembe and others v Republic*, let alone *Kasambala v Republic*. He does not discuss or mention the case. He comments straight on the Mwaungulu approach:

But I would say our law as it stands does not support the Mwaungulu or American proposition. In fact in England the case is similar. Once sentenced; you cannot use the appeal as a basis per se of avoiding jail term.

10 On 7 October, 2016 at 00:28, Mr Chimimba responds to Mr Theu’s comment. He discusses the two approaches, the exceptional circumstance and interests of justice paradigm. He neither mentions nor discusses *Kumwembe and others v Republic*, let alone *Kasambala v Republic*:

Bright

The two are different thoughts but perhaps connected by a jurisprudential orientation that suggests that right to bail is not adversely affected until one has exhausted his right of appeal.

15 On 7 October, 2016, 11:01 am Mr Chimimba responds to Dr Madise. This comment is important. It stresses that the focus is not *Kumwembe and others v Republic*. The matter of focus – the debate between exceptional circumstances and interests of justice – has been discussed before. It is not *Kumwembe and others v Republic*. The previous discussions appear later in the judgment:

Sundu,

“We have discussed this matter before. It is not going to be re-litigated”.

20 The next contribution is on 7 October, 2016, at 22:06 by Mr. Chimimba.

Imwe ba Daka,

“This is not a numbers game.... I simply do not belong to prison industrial complex!”

Mr Chimimba’s comment is piquant. It, however, invokes serious humour from Dr Madise who comments on Saturday, 8 October, 2016 at 7:48 pm. Neither Mr Chimimba nor Dr Madise mention or discuss *Kumwembe and others v Republic*, let alone *Kasambala v Republic*:

25 **Ha ha ha**

Koma Trev

Mpaka Prison Industrial Complex

My first comment is on 18 October, 2016, 5:35 pm which is exactly a fortnight after Dr Madise posted *Kumwembe and others v Republic* and twelve days after contributors commended the discussion:

30 **“Trevor, you are right. In fact my decision has statutory force! If the Supreme Court and the High Court came to contrary test, those decisions are per in curium our statute and they should never as in ever be followed at all!”**

35 **You see, Trevor, the practice here is painstaking and all of us are stuck to what we learnt in college, which is very little! We do not check trends, read articles or other decisions. This test is now confirmed by statute for before and after conviction!**

40 There is no mention or discussion of *Kumwembe and others v Republic*, let alone *Kasambala v Republic*. In fact, my comment is about my decision in *Kumuwa and others v Republic* (2012) Bail Application Case No 107 (MHC) (PR) (unreported) – not *Kumwembe and others v Republic*. The second statement shows two things. First, my comment is about all precedents from the Supreme Court and the High Court – not specifically *Republic v Kumwembe*. The use of the word ‘if’ comports that I have not read any of the other precedents – let alone *Kumwembe and others v Republic*. My comments are, therefore, general and about the cases. There are decisions that follow the principle and those are not *per incuriam*.

That Trevor and I agree excites Mr Soko who on 18 October, 2016, 6:03 exclaims:

“Ha! And then it came to pass that Trev and the Judge finally agreed on something. Now, there is something you don’t see every day!”

45 My next comment on 18 October, 2016, 6:43 pm and directed to Mr Soko’s earlier comment. There is no mention of *Kumwembe and others v Republic*, let alone *Kasambala v Republic*. There is certainly no mention of the *Kasambala v Republic*. The comment goes directly to the issue and concerns that issue only – the test in the Mwaungulu approach:

Soko, the test is now settled by statute. We are not agreeing with each other; we are agreeing with the statute.”

It is, again, the test which preoccupies Mr Soko in his brief comment on Tuesday, 18 October, 2016, 7:32 pm:

“Er...not to re-litigate the matter, but which statute is that JA?”

5 The comment I make on Tuesday, 18 October, 2016 at 7:37 in response to Mr. Soko is more revealing. Pressed for the statute, with an exclamation mark, I refer to the Bail Guidelines Act. It should not be the Bail Guidelines Act. It is section 24 (1) of the Supreme Court of Appeal Act. The submission discusses the new approach – in the context of the statute and precedents. It does not mention *Kumwembe and others v Republic* at all – let alone *Kasambala v Republic*.

10 **“No re-litigation! The Bail Guidelines Act! I do not have the Act, but read the portion dealing with bail in courts!**

If as we know two High Court Judges disagree with a decision I made in the court pointing the new approach and they were unaware of a statute to the same effect, there is not re-litigation!

The statute is greater than 1000 Supreme Court Judgments they rely on!

15 In the next response to Mr Theu on Wednesday, October, 19, 2016 at 11:15 am, the focus is the same, the threshold for granting bail pending appeal. There is no mention or discussion of *Kumwembe and others v Republic*, let alone *Kasambala v Republic*, let alone *Kasambala v Republic*. The emphasis now changes to the judge’s law making power and suggest that the concept of justice in *American Cyanamid Co. v Ethicon Ltd.*, [1975] 1 All ER 504 applies:

20 **Bright, some of us are at the cutting edge of justice, doing what judges do, as Dworkin puts it, competing for the future in the present what others have contributed to the chapter of the common law!**

To suggest that the primary test is now the interest of justice is to come to the edge, cutting edge! My judgment actually recognises that the test is as suggested by the Supreme Court, but I am pushing the point to its proper limit, to say the real test is the interest of justice where many factors, including the fact of conviction, are nothing but considerations.

25 **In comparative law, it is bringing American Cyanamid in, probably!**

This shows the inner qualities of a common law judge! Ready to expand the law! I am sure that the reason why the matter is sought to be re-litigated or re-justified in human right approaches ignores the fact that it is in this respect that to think that for bail the test is the same and it is the interest of justice is new and radical

30 **Human right law and precedent will never address it, both will have to embrace the development. I for one am not in favour of laws that suggest special circumstances; they create satellites litigation about what is and is not a special circumstance; a special circumstance may not be a circumstance and not special in certain circumstances! The test of interest of justice allows all circumstances to be considered and weighed!**

35 **WELCOME TO THE CUTTING EDGE OF COMMON LAW JUDGES AS MAKERS OF THE LAW**

This contribution attracts this comment from Mr Theu on 19 October, 2016 at 11:39 am. Once again, there is no mention or discussion of *Kumwembe and others v Republic*, let alone *Kasambala v Republic*:

40 **So much about cutting edge....now that murky waters and it is unfair to expect that we can respond to claims with honesty.**

Expanding the law is not an end in itself. You don't expand the law because it is expandable. This is not quite the issue. The issue is whether when purport to be expanding the law, we are doing it on sound grounds and for just cause. In this respect, the position you advance my lord is thoroughly wanting in soundness and the propriety of the underlying cause.

45 **Besides, codified law can only be expanded to a point, beyond which only changing the codified law itself is the means of expanding it. The latter is none of your business at the bench.**

This is Dr Madise’s further response on 19 October, 2016, 1207 pm – no reference to *Kumwembe and others v Republic*, let alone *Kasambala v Republic*:

50 **Doing cutting edge does not equal to doing it right. In fact most cutting edge research ends up in the trash bin.**

My response to Dr Madise on Wednesday, 19 October, 2016 focuses on the principle – not on *Kumwembe and others v Republic*, let alone *Kasambala v Republic*:

I am not doing research, Professor Sundu, I am deciding, being at the edge to affect the common law! You research, I decide, with a bit of research.

So when I decide that bail on appeal should be based on the interest of justice, I am not researching, I am creating new frontiers!

5 **As you can see, breaking new frontiers has sparked all this discussion!**

That is being at the edge of things!

Even Mr Theu's further response on 19 October, 2016, 5:57 does not mention or discuss *Kumwembe and others v Republic*, let alone *Kasambala v Republic*:

10 **I could expound an outlandishly erroneous proposition law and provoke profound reaction and dismay. Should I celebrate that as being at the cutting of things?**

The last contribution, from the evidence that the Director of Public Prosecutions proffered, is mine on Wednesday 19 October, 2016 at 6:00 pm. It ends exactly where Mr Chimimba started the discourse – the approach. There is no discussion of *Kumwembe and others v Republic*, let alone *Kasambala v Republic*:

15 **Bright, it depends on what you think, judges make law. Theu, the traditional view is crumbling, slowly but surely. It is cumbersome for real decision making. It is not even a guide, it creates satellite and enormous litigation as not to be principle at all.**

20 This discourse between 6 and 18 October, as the evidence from the Director of Public Prosecutions shows, follows another discourse on 10 June, 2016 – again from the evidence of the Director of Public Prosecution. As the evidence shows, what initially was being discussed was whether the right to presumption of innocence is relevant to bail pending appeal. The discourse, however, ends with my statement on the principle of interests of justice. The Supreme Court of Appeal decision of *Makiseni v Republic* (2015) Criminal Appeal No 14 (unreported) was lodged on the Malawi Law Society Google Group and my comment on 10 June, 2016 at 10:46 am poses a few questions on Mr Nyirenda's contribution. This well before the judgments in *Kumwembe and others v Republic* and *Kasambala v Republic*:

25 **Mr. Nyirenda, according to you analysis, the court hearing an appeal from first instances must not approach the appeal from the presumption of innocence. It means that the appeal court should never consider whether the state had the duty to prove the case and to the requisite standard. The burden and standard of proof premise on the presumption of innocence, even if it be obliquely, which it is not! Do you really think that on appeal, the presumption of innocence disappears?**

30 Mr. Nyirenda's response on 10 June, 2016, 11:28 am, much like mine, does not comment or discuss *Makiseni v Republic* DATE: 10th Jun., 2016 at 11:28 am:

35 **The court should try as much as possible preempting the substantive appeal during bail pending appeal. I am not saying the appellate court should not consider whether the state had a duty to prove its case. After all this should be done when hearing the appeal itself. When hearing application for bail pending appeal, the court does not consider whether the state has a duty to prove the case or not. At that stage the duty rests on the convict to prove exceptional circumstances.**

It is this comment – rather than *Makiseni v Republic* – that causes me to ask on 10 June, 2016, 11:52 am if Mr Nyirenda belongs to the school of the traditional approach:

40 **Mr. Nyirenda, you belong to the old school of exceptional circumstances. There are in theory and practice no exceptional circumstances! Such a formulation leads to satellite litigation about what are and whether they occur in what proportions. At the least, the epithet just means the matter is discretionary! And for bail under the Constitution, the test is in the interest of justice.**

45 **Section 355 of the CP and EC that creates the right to bail, flying right in the face of the presumption to bail, for a convicted person, creates so such limitation, such a limitation eschews discretion.**

Courts are wary with anything that fetters discretion, these days!

My last response – from the evidence the Director of Public Prosecution presented – is on Friday, 10 June, 2016 at 12:38 pm. Mr Nyirenda must have emailed directly. That is why the statement I respond to does not appear in the Director of Public Prosecution's evidence:

50 **The difference is the same. Powers create rights; rights create power! Where the court has power to do something, I acquire a right to that power, not so?**

There are three other factual issues that should also be mentioned. The first is that on 16 October, Kapanda, JA, delivered the judgment in *Kusowa v Republic*, (2015) Criminal Appeal No 9 (MSCA) (unreported). After discussing what are special circumstances and their place, the Justice of Appeal says this about the interests of justice and justice, paragraph 25-31 on page 14 and paragraphs 1-4 on page 15:

5 However, where the application for bail is after conviction and pending an appeal is brought before an appellate court, the appellate court will not grant bail unless there are exceptional reasons, the exceptional reasons to be considered by an appellate court may include the following: (1) if the applicant, being a first offender, had previously been of good behavior; (2) if substantial grounds of law are involved, it is useful to see if there is any prospect of success; and where, having regard to the very heavy congestion of appeals pending in the courts, a refusal of bail to the applicant would have the result of the whole or a considerable portion of the sentence imposed on the applicant being served, before the appeal is heard.

10 This decision introduces the need for exceptional reasons – not exceptional circumstances. The Justice of Appeal follows this statement by one of the interests of justice:

15 Further, it has been the understanding of this Court that the grant of bail to a convicted person ought really to be given more attention if to grant otherwise might occasion an injustice to such a person if he were to succeed on appeal. Therefore, if the circumstances permit, an application for the grant of bail pending appeal should be given an ear to by our courts. This will be so if it is the overall furtherance of justice delivery in our society. [Emphasis supplied].

Kapanda, JA, earlier approved a long passage by Tembo, JA, in *Suleman v Republic* [2004] MLR 398 approving this statement by Chatsika, JA, regarding ‘unusual or exceptional circumstances.’ Chatsika, JA, first said:

20 In an application for bail pending 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, as one form of punishment, his freedom, on the basis of his conviction. He is no longer a free man. Therefore, in order to grant freedom to such a person whose fundamental freedom has been lost by the conviction, there must exist some ‘exceptional or unusual circumstances.’

25 What must not be lost – and this is lost in subsequent judgments by this court and the court below – is his elaboration that all circumstances must be considered in arriving at the unusual or exceptional circumstances. Chatsika, JA, said, by way of explanation:

30 In other words, the case [not the circumstances, my addition] must be unusual and exceptional 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.

This statement, as properly noted by Kapanda, JA in *Kusowa v Republic*, was heavily criticized by Tembo, JA, in *Suleman v Republic*. The Supreme Court went further and confirmed the correct principle as laid in *R v Watton* (1979) 68 Cr App R 293. The Supreme Court in *Suleman v Republic* said:

35 With greatest respect, it must be pointed out ... that the learned Chatsika, JA, had expressed an opinion on the status of the law which was, and is, not supported by any case authorities, yes indeed, including the English Court of Appeal decision in *Watton* ... An accurate statement of such law is reflected at page 296 of the report on the judgement in the *Watton* case (supra) as follows:

40 Mr Bloom-Cooper drew our attention, very properly, to Appendix F and a portion of paragraph 5, thereof, which runs as follows: ‘In appeals from the Crown Court, however, bail can only be granted by the Court of Appeal and is rarely done. We would wish to see some relaxation of the principles laid down by the Court of Appeal relating to the granting of bail pending appeal ... We think that is a correct formulation of the law ... and the true question is, are there exceptional circumstances, which would drive the court to the conclusion that justice can only be done by granting bail [Emphasis supplied].

50 The next factual issue is that on 17 January, 2017 this court delivered judgement in *Letasi v Republic*. In this decision, this Court reviewed the decisions of this Court, including *Suleman v Republic* and continuing on the twin issues of exceptional circumstances and interests of justice. On the former, the Court following two decisions of this court concluded – much like Chatsika, JA, in *Republic v Chihana* - that all circumstances, irrespective of generality or specialty, must be considered in exercise of what is a wide discretion in section 24 (1) of the Supreme Court Act. This Court in *Letasi v Republic* approved this statement – of general application:

55 The Supreme court in *Tembo and others v Director of Public Prosecutions* cites, with approval a passage from *S v Smith and Another*, (1969) (4) SA 175, 177 (N), a South African case. The statement is of general application. Harcourt, J. said:

The general principles ‘governing the grant of bail are that, in exercising the statutory discretion conferred upon it, the court must be governed by the foundational principle, which is to uphold the interests of justice; the court

will always grant bail where possible, and will lean in favour of, and not against, the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby.

5 Moreover, this Court in *Republic v Tembo* laid to ghost this conundrum of exceptional or unusual circumstances:

10 Observably, it was the accused person who was required to show such "exceptional circumstances". But these are not magic words. As was correctly observed by Mwaungulu, Ag. J., in the *Yiannakis* case, what is really meant by "proof of exceptional circumstances" is that in relation to serious offences such as capital offences, in exercising its discretion whether or not to grant bail, the court should weigh the total facts carefully and, to put it in the learned Judge's own words, "with the utmost of circumspection" ... Before I pass on to the next point, let me emphasize that the expression "exceptional circumstances" is not a term of art and in this regard the fact that an accused is a sickly person or that he is a respectable member of his community or the fact that he has a possible strong defence to the charge laid against him could, in my view, constitute "exceptional circumstances" within the meaning just discussed, so as to entitle the court to grant bail; it all depends on the facts of the particular case.

20 It was unnecessary to revive it. This court further held that the test is now laid by statute – section 24 (1) of the Supreme Court Act – it is as the Court deems fit. Suggestions that other principles should limit this wide discretion are unacceptable. Introduction of the fit in section 24 (1) of the Supreme Court Act was to replace the common law of the time. On the notion of interests of justice, this court held that this is the principle of the common law of Malawi and elsewhere – in the United Kingdom, this principle dates to when *R v Watton* was decided, 1976. This is the principle of common laws of many countries. It is backed by the Constitution and many internationally decided cases which, under section 11 of the Constitution, must aid its interpretation.

25 The final factual aspect is that it is in *Letasi v Republic* where I actually refer to *Kumwembe and others v Republic*, but only as precedent. In *Letasi v Republic*, *Kumwembe and others* was not on appeal. Consequently, I make no determination on the case. It is only – as precedent – mentioned in passing on the general principle:

30 Before, therefore, considering decisions of this court and the court below on the matter, it is necessary to demonstrate that granting or refusing bail pending appeal depends on whether the appeal is between the lower court and the court below, on one hand, and between the court below and this court. These considerations imply that the decision of this court in *Chihana v Republic* - laying the test of exceptional circumstances - is *per incuriam* section 24 of the Supreme Court of Appeal Act. Based on section 355 (1) of the Criminal Procedure and Evidence Code, the test of special circumstances does not arise. The cases of *Republic v Pandirker* [1971-72] 5 M L R 328; *Kamaliza and others v Republic* [1993] 16 (1) M L R 196; *Kumuwa and others v Republic* (2012) 35 Bail Application Case No 107 (MHC) (PR) *Sipolo v Republic* (2016) Criminal Appeal No 36 (MHC) (PR) (unreported); *Uche v Republic* (2015) Criminal Appeal No 110 (MHC) (LR) (unreported) and *Kumwembe and others v Republic* (2013) Criminal Case No 65 (MHC) (LR), therefore, were probably inapplicable. They were, therefore, misapplied in the *Chihana* case. The cases of *Uche v Republic* and *Kumwembe and others v Republic* in which the case of *Kumuwa and others v Republic* was, allegedly, departed from, were dealing with an appeal from the High Court to the Supreme Court. They, therefore, could not have departed from *Kumuwa and others v Republic*.

Later in the judgment I said:

45 The requirement of special circumstances in this court bases, on decisions of this court in *Chihana v Republic*, *Suleman v Republic* [2004] M L R 398; and *Masikeni and others v Republic* (2015) Criminal Appeal No 14 (MSCA) (unreported). There is a similar statement, albeit *obiter*, in this court's decision in *Mhahe v Republic* (2005) Criminal Appeal No 25 (MSCA) (unreported). Those decisions confirmed the (common) law and practice in the court below in *Republic v Pandirker* [1971-72] 5 M L R 328; and *Kamaliza and others v Republic* [1993] 16 (1) M L R 196. In *Kumuwa and others v Republic* (2012) Bail Application Case No 107 (MHC) (PR) (unreported) the court below decided that the dominant principle on application for bail whether before or after conviction is the interests of justice. The principle was followed, without citing *Kumuwa and others v Republic* in *Sipolo v Republic* (2016) Criminal Appeal No 36 (MHC) (PR) (unreported). Before that, the court below refused to follow *Kumuwa and others v Republic* in *Uche v Republic* (2015) Criminal Appeal No 110 (MHC) (LR) (unreported) and *Kumwembe and others v Republic* (2013) Criminal Case No 65 (MHC) (LR) (unreported). The court below in *Uche v Republic* and *Kumwembe and others v Republic* refused to follow *Kumuwa and others v Republic* essentially because, according to the court below, this Court has yet to approve the approach and depart from its earlier position that bail on appeal is granted only in exceptional circumstances. There are, however, certain assumptions on

which the court below in *Uche v Republic* and *Kumwembe and others v Republic* refused to follow *Kumuwa and others v Republic*

Reasoning

As already seen, the question about interest of justice dominated the court below – more especially after my decision in *Kumuwa and others v Republic* (2012) Bail Application Case No 107 (MHC) (PR) where I pressed the point. Two decisions in the court below are opposed to this view. They remained to the view, which they thought was the view of the Supreme Court in *Chihana v Republic* that granting of bail pending appeal bases on proof of exceptional circumstances. Two decisions of this Court – *Makiseni v Republic* and *Letasi v Republic* – now demonstrate that *Republic v Chihana* was misunderstood. Those decisions are binding on the court below and are the law currently on the subject.

The Director of Public Prosecution’s application comports that because I have held so I am biased – to the principle that bail pending appeal must be granted after considering all the circumstances and in the interests of justice– that I should not preside on this bail application pending appeal or on any applications for bail pending appeal, until my decision has been reversed or reviewed by others in this court. Put differently, the Director of Public Prosecution thinks that another judge or panel of judges should sit in this matter because in *Letasi v Republic* I decided that for bail pending appeal a court must regard all circumstances and refuse or grant bail in the interests of justice.

The Director of Public Prosecution masquerades this real question by suggesting that the recusal must base on that I earlier commented on the *Kumwembe and others v Republic*. The evidence the Director of Public Prosecution actually demonstrates that my comments and those of others who also commented, albeit in the thread on *Kumwembe and others v Republic*, were on an earlier long drawn discussion – bail pending appeal bases on interests of justice. There is no evidence proffered by the Director of Public Prosecution that I commented on *Kumwembe and others v Republic* let alone *Kasambala v Republic*. There is no evidence that, having espoused this principle, I then applied it and resolved *Kumwembe and others v Republic*, let alone *Kasambala v Republic* one way or the other. The most that I did was to show that special circumstances were not the (only) consideration – a court must consider all circumstances (including, special circumstances) and all in the interests of justice. Now, these comments are dug from the debris of history. Whatever their importance, these comments crystallized into precedents – binding judicial pronouncements. The odium in the application is in the suggestion that I should recuse myself because my decision was seminal to the introduction of the precedent – the administration and the development of the common law.

This has never been a basis of a judge’s recusal, however, forthright and vociferous a judge or court has been in establishing a precedent. More importantly, it has never, as in ever, been said of a judge or a court that a judge or a court is biased when formulating or applying a precedent pursuant the constitutional function – under section 11 (2) of the Constitution – of developing the common law. As the Court said in *Vakaatu v Kelly*, if the law was otherwise, the administration of justice would grind to a halt. Moreover, if parties – including the Director of Public Prosecutions – were allowed to have judges or courts recuse because parties are unhappy with the law and precedents they espouse or may espouse, we would have the like of juror rebuttals – permissible for triers of fact – unthinkable in matters of law. There would be a constitutional crisis where – as is being touted – the Supreme Court, as it should be, has a fixed number (there is a constitutional duty – not delegable to determine the number of judges) and fewer judges who have to sit in all cases (*President of South Africa v South African Rugby Football Union* 1999 4 (SA) 147). The parties will determine choose, shop and determine judges who, like in this case, support the special circumstances test. The solution, in my judgment, does not lie in pitching judges of one view against each other or together.

Our legal system insures against this malady that could lead to malfunctioning of the justice process under two intertwined principles – the right of a citizen to, what for lack of a better term, may be called a natural judge (a term first appearing in *State v Minister of Finance*, ex parte *S G S Malawi, Ltd* (2003) Civil Application No 40 (MHC) (PR) (unreported) and approved in *State v The State President of Malawi and others*, ex parte *The Council of the University of Malawi* (2011) Civil Appeal No 41 (MSCA) (unreported), (unreported), this Court in and judicial independence. A natural judge, more especially where there are more judges, is one that, through a fair and independent system of allocating a judge and cases, a citizen must have determine a matter. The right, however, never extends to a right to choose or determine a judge to decide the matter. That is interference with judicial independence which undermines judicial impartiality. One principal tenet of judicial independence is the power and ability of courts to allocate business to judicial officers without interference from anyone – the executive, the legislature, the parties, the public or any external influence. The court will and must resist attempts to undermine judicial independence and impartiality with fortitude, resolve and resilience – even with a prospect of contempt proceedings ((*President of South Africa v South African Rugby Football Union* 1999 4 (SA) 147).

There are, after the court determines a natural judge, rights and obligations among parties and a natural judge. Once a matter is assigned to a judge, the judge is under a duty to decide it and, at it, with independence and impartiality ascertain the facts and apply the ascertained law. Legislators and the President can – for most matters presented to them – choose not to act. A judge assigned the case has no such luxury – there is a duty to sit (*Sumuka Enterprise v African Business Association* [1981-83] 10 MLR 269; *Attorney General v Chipeta* (1994) Miscellaneous Civil Application No 33 (MSCA) (unreported); *In re Republic v Kadwa and section 42 (2) (f) of the Constitution and the Criminal Procedure and evidence Code* (2006) Miscellaneous Civil Application No 2005 (HCM) (PR) (unreported), *Robbie the Pict v HM Advocate* [2002] Scott.H.C. 333; *Simonson v General Motors Corp* 435 F. Supp 574 at 578 (USDC, pa., 1976); *Cline v Sawyer* 600 P. 2d 725 at 729 (SC, Wyoming ,1979); *Re Drexel Burnham Lambert Inc* 861 F. 2d 1307 at 1312 (2nd Cir., 1988); *Nicholas v Alley* 71 F. 3d. 347 at 351 (10th Cir., 1995); *Locabail (UK) Ltd Bayfield Properties Ltd*; *Re JRL, Ex p. CJL* (1986) 161 C.L.R. 342, p. 352; *Bienstein v Bienstein* [2003] H.C.A. 7 at [35]-[36]; *President of the Republic of South Africa v South African Rugby Football Union* 1999(4) S.A. 147 at [148] (Constitutional Court); *SACCAWU v Irvin & Johnson*, 2000 (3) S.A 705 at [13] (Constitutional Court); *Liljeberg v Health Services Acquisition Corp* 486 U.S. 847, P871; (OLOFOFOYE, A. A. ‘Subjective objectivity: judicial impartiality and social intercourse in the US Supreme Court,’ 2006, Public Law). In *Robbie the Pict v HM Advocate* the Court said:

A judge who considers that there is a sound objection to his participation in a case has a duty to recuse himself at once. If he is in doubt, he should disclose his difficulty to the parties. But if he

considers that there is no sound objection to his participation, it is his plain duty to proceed with the case.

The citizen is entitled, as of right, under section 9 of the Constitution to an independent and impartial judge. The natural judge – and many judges do – can recuse where the judge has a personal interest in the matter or is connected with the case, the evidence, the facts or the parties – not the law. These considerations do not lead to automatic recusal.

Where reasons can be disclosed without prejudice to parties or witnesses, parties, may require a judge to proceed. In *Locabail (UK) Ltd v Bayfield Properties Ltd and another* [1999] EWCA 3004 the England and Wales Court of Appeal said:

Although disqualification under the rule in *Dimes and Pinochet (No 2)* is properly described as automatic, a party with the irresistible right to object to a judge hearing or to continue hearing a case, as in other cases which we refer below, waive his right to object. It is however clear that every waiver must be clear and unequivocal, and made with full knowledge of all relevant facts to the decision whether to waive or not.

Judges may be required for example to disclose shareholdings – there is movement to avoid pedantry ('Judge not, that ye be not judged,' judging judge decision-making, F A Mann Lectures, 2015, Lord Neuberger). Parties also have a right to require a judge to recuse on proven grounds. Equally, the recusal is not automatic. A judge will not recuse on just the mere suggestion; a judge will also not stubbornly refuse a request for recusal.

Bias must be determined objectively and subjectively (*Piersack v Belgium* (Series No 3 (1982)); *Haulschildt v Denmark* (Series No 154 (1989)), both decisions of the European Court of Human rights, and *Montgomery and Coulter v Her Majesty's Advocate No 2* (16 November, 1999) and *Hoekstra and others v Her Majesty's Advocate* [2000] ScotHC 32, both decisions of the England and Wales Court of Appeals. Subjectively, the convictions of a judge must be investigated to determine if those convictions would passionately – without dispassion - lean to a preconceived outcome. The convictions must be external to the facts or law under consideration. A judge cannot be biased for convictions on the facts and the law arising in a case. Where, subjectively, there is proof of bias or possibility of bias, a judge must consider recusal unless parties think that, despite those convictions, the judge can nevertheless act impartially. There must be proof otherwise a judge's impartiality is presumed. In *Piersack v Belgium* the European Court of Human Rights said in paragraph 30:

As regards the first approach [the subjective test], the court notices that the appellant is pleased to pay tribute to Mr Van de Walle's personal impartiality; it does not itself have any cause for doubt on this score and indeed personal impartiality is to be presumed unless there is proof to the contrary ...

It is very rare and difficult to prove subjective bias. In addition, therefore, to the subjective test, bias may be deduced from appearance – justice must not only be done, it must be seen to be done. In *Haulschildt v Denmark* the European Court of Human Rights said:

Under the subjective test, it must be determined whether, apart from a judge's personal conduct, there are certain ascertainable facts which might raise doubt as to his impartiality. In this respect, even appearance may be of certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as criminal proceedings are concerned,

Where a judge or court has personal interest and is connected to the case, the facts and the evidence, recusal, subject to the *de minimis* rule, bases on bias – the risk of justice being tainted with partiality (*Sumuka Enterprise v African Business Association*; *Dimes v The Proprietors of the Grand Junction Canal* [1852] 3 H.L. 759; *R v Rand* (1886) LR 1 Q.B. 230; *R v Camborne Justices, ex parte Pearce* [1955] 1 Q.B. 41; *R v Gough* [1993] A.C. 646; *Clenae Properties Ltd and others v Australia and New Zealand Banking Group* [VSCA] 35 (Supreme Court of Victoria); *BTR Industries South Africa (PTY) Ltd v Metal and Allies Workers' Union* (1992 (3) SA 673; *R v Inner West London Coroner, ex parte Dallaglio* [1994] 4 All E.R. 139; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 N.Z.L.R. 142); and *Webb v R* (1994) 181 CLR 41). Recusal extends to non-proprietary interests where on the whole there is prospect of bias (*R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR. 272. Where facts demonstrate that impartiality may not be achieved, the risk to justice may be perceived or real. In either case, the court or judge, unless parties have confidence in the judge or court or there are other compelling reasons, recusal must seriously be considered. Eve J. in *Law v. Chattered Institute of Patent Agents* [1919] 2 CH 276 at p. 289 said:

If he has a bias which he rendered him otherwise than impartial judge he is disqualified from performing his duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's, impartiality those circumstances are themselves sufficient to disqualify although in fact no bias exists.

The High Court of Australia in *Livesey v The New South Wales Bar Association* (1983) 151 CLR 288) and the South African Constitution Court in *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 doubted, justifiably, the word 'suspicion,' preferring 'apprehension of bias.' In the United Kingdom, as pointed out in *R v Bow Street Metropolitan Stipendiary Magistrate (No 2)* [1992] 2 WLR 272 and a specially constituted Court of Appeal in *Locabail Ltd v Bayfield Properties* [2001] 1 All ER 65, there were two views by the House of Lords, now the United Kingdom Supreme Court in *R v Gough* [1993] AC 643 and the one in Scotland in

Blackford v Macleod (1986) SLT 444. The House of Lords required that there must be ‘real danger’ of impartiality. The Court of Appeals essayed to resolve the conflict in *In re Medicaments and Related Classes of Cases No 2* [2001] 1 WLR 700:

5 When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is call for, which makes kit plain that it is, in effect, no different from test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or real danger, the two being the same, that the tribunal was biased.

The House of Lords in *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187, quoting this passage, said

10 I respectfully suggest that your lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to “a real danger”. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

20 The United Kingdom House of Lords in *Helow v Secretary of State for the Home Department and another* (2008 UKHL 62) describes, though not exhaustively, the fair-minded and informed observer – not just the fair-minded observer:

25 “The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para53. Her approach must be confused with that of the person who has brought the complaint. The “real possibility” test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

30 Then there is the attribute that the observer is “informed”. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of any article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which must consider before passing judgment.

40 These attributes are not exhaustive, A. A. Olowofoyeku, in ‘Subjective Objectivity: judicial impartiality and social intercourse in the U S Supreme Court,’ Public Law, 2006, collected a few more from other jurisdictions. The test from this Court – *Sumuka Enterprise v African Business Association* – was that of a reasonable man. The court below in *In re Republic v Kadwa and section 42 (2) (f) of the Constitution and the Criminal Procedure and evidence Code* referred to the reasonable man and the fair-minded observer. This court in *State v The State President of Malawi and others*, ex parte *The Council of the University of Malawi*, adding on *Sumuka Enterprises Ltd v African Business Association*, refers to a reasonable man who has information. The test – now universally followed – is that of a fair-minded and informed observer.

45 *The need for proof*

A party who requests a judge’s recusal must prove conduct or misconduct of a judge that would to a fair minded person or observer prevent a judge from acting with impartiality. Otherwise, a judge’s impartiality will be presumed. In *Porter v Magill* the court stated:

50 The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead to a fair-minded and informed observer to conclude that there was a real possibility ... that the tribunal was biased.

55 In relation to bias, it must be demonstrated that the conduct complained of can found bias – and, therefore, colour decision making and outcome of the case. This has two sides to it. First, the conduct or statement must be such that it shows that an otherwise impartial judge would decide one way or for or against one party. The conduct or statement itself must be such that it is prejudicial or that must show partiality. On the first aspect, the comment objected to that, on bail pending appeal, bail is granted in the interests of justice. The test is neutral – burdens and eases the applicant and the State opposing or supporting the bail application. The test, therefore, is actually favourable to the State. One, therefore,

cannot understand what the complaint of the Director of Public Prosecution argument is. The correct interpretation – which is what I insisted in my comment and my decisions is that it is not sufficient that there are exceptional circumstances, the ultimate consideration is the interests of justice. Consequently, even where there are exceptional circumstances, the court is governed by the justice in the order, refusing or allowing, release on bail. This statement is not wrong or unfounded.

5 In relation to a statement, it must be shown, that the statement shows bias. Bias, in this context, is not a notion that relates to nothing or everything else. It must be shown in the conduct complained of that a judge leans against partiality. In this case, the criticism is based on a comment, an opinion that I hold to be the law. The conduct the Director of Public Prosecution alleges is that for a long time I commented on *Kumwembe and others v Republic*. As demonstrated, neither I nor other contributors commented on *Kumwembe and others v Republic* let alone *Kasambala v Republic*. Since I never commented on *Kumwembe and others* and certainly *Republic v Kasambala* were not discussed at all, there is no basis for the application and, therefore, recusal.

The conduct must be understood as a whole

15 My comments, as the affidavit shows, were part of a long discourse on Malawi Law Society Google Group on location of interests of justice on bail – before and after conviction. The Director of Public Prosecution cannot dissociate the comments in Malawi Law Society Google Group and isolate the comments from the wider discussion on Malawi Law Society Google Group question. The comments must be read as a whole and in context. Only isolating some aspects, as is done here, cannot be the attitude of a fair-minded and informed observer. In *Helow v Secretary of State for the Home Department and another* (2008 UKHL 62) the Court said:

20 I am indebted to the noble and learned Lord Mance for his survey of them. While these views were without doubt strongly partisan in tone, they were drawn from a selection of the total material appearing in the journal over a period of years. An informed and fair-minded observer who took account of what appeared in the issues of the journal would no doubt take an overall view and not simply concentrate on parts. Examinations of the lists of contents shows that the journals also included articles on matters of legal interest, the type of articles which one would expect to find in a periodical for lawyers and judges.”

25 The isolation only obscures that all the comments all contributors made after Dr Madise lodged *Republic v Kumwembe* on the Malawi Law Society Google Group were part of a wider discourse on the position of interests of justice when granting bail pending appeal. In all contributions following their introduction on the Malawi Law Society Google Group, *Kumwembe and others v Republic*, let alone *Kasambala v Republic* and *Makiseni v Republic* are never discussed

Are my other comments a basis of recusal?

30 Having removed the fiction, even if I commented on *Republic v Kumwembe*, it is necessary to consider if the conduct – my comment on the principle underpinning bail, generally, and bail pending appeal, specifically – is such that a judge could recuse oneself for.

There was no pending matter on bail pending appeal

35 One point taken very vehemently was that a judge should not comment on matters likely to arise before the judge for determination. There can be no doubt, if any, about the wisdom of the rule. The principle, however, operates in space and time. Concerning time, beyond that *Kumwembe and others v Republic* was precedent – something considered later, the High Court on 21 July, 2016 delivered judgment. The defendants appealed on 22 July, 2016. The court below on July 2016 rejected their bail application. The defendants never appealed against that order. My first comment on 18 October, 2016 was 16 weeks after the court below rejected the bail application. If I commented on the case – which I did not – the time to appeal or review was well passed. Of course, there could be extension of time to appeal or ask a single member of this court to consider the application. The matter was practically not live. It cannot, therefore, be argued that the bail matter was impending or pending before a court. The argument is, therefore, anachronistic and perfunctory. A fair-minded and informed observer, informed of that bail applications appeals or reviews lapse with time, cannot conclude that there is bias if a court – as I did in this case – regards that order as precedent.

The comments on the Malawi Law Society Google Group lapsed with effluxion of time

45 The comments, moreover, must be recent as to be capable of influencing a judge. The conduct must be immediate and there must no intervening circumstances affecting the conduct. Time allows for reconsideration of comments and, therefore, statements made several months may not influence a decision as to affect a court’s impartiality. I made these comments – if at all they could be a basis of bias – on 18 October, 2016. The defendants made the current application on 23 March, 2017. The court set down the hearing for 23 April, 2017 – that is almost seven months. A fair-minded observer, informed of the time would not, unless there is other evidence, think that a judge would hold to those views after such an interposition of time. More so if, as happened here, there is evidence that in a matter before the same judge, the judge, felt, as he should, to be bound by precedent.

50 As we saw and as conceded by the Director of Public Prosecutions, those comments crystallized into a judgment. Between comments on the Malawi Law Society Google Group and these applications for bail pending appeal *Kusowa v Republic* and *Letasi v Republic* have been decided. There is, therefore, with passage of time an intervening act. It is *Kusowa v Republic* and *Letasi v Republic*, rather than earlier comments on the Malawi Law Society Google Group which would dominate. In *Locabail (UK) Ltd v Bayfield Property Ltd and another* [1999] EWCA Civ 3004 (17 November, 1999), the Court of Appeals for England and Wales said:

55 The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

In *Hoekstra and others v Her Majesty's Advocate* Lord McCluskey published comments on 6 February, 2000. The hearing was supposed to be had on 6 March, 2000. Lord McCluskey sat with Kirkwood and Hamilton on the case heard the appeal – on devolution issues – between 23 and 28 November, 2000. They delivered judgments on 28 November, 1999 – not exhausting all the issues. On 6 February, 2000 Lord McCluskey published an article with comments critical of the devolution. The three members of the court set 6 March, 2000 to consider the remaining matters on appeal. The parties, in view of comments of 6 February, 2000, wanted the judge to recuse. The proximity of the comments to the Judge's hearing did not escape the attention of the Court of Appeals for England and Wales:

It appears to us that the article, published shortly after the decision on the appeal, would create in the mind of an informed observer an apprehension of bias on the part of Lord McCluskey against the Convention and the rights deriving from it, even if in fact no bias existed in the way in which he and other judges had actually determined the scope of those rights in disposing of the issues in the case.

In *Helow v Secretary of State for the Home Department* the court, mindful of the time and the volume of comments, said that the hypothetical fair-minded and informed observer would have to regard time:

So the hypothetical observer would have to consider whether there was a real risk that these articles, read at perhaps quarterly intervals, over a period of years would have so affected Lady Cosgrove as to make it impossible for her to judge the petition impartially

With passage of time, there is an intervening act – a decision that binds the court – not comments made in the Malawi Law Society Google Group

As all the comments I made show – and the Director of Public Prosecutions admits as much in the affidavits, skeletal and oral arguments and the subsequent decision – I arrive at the conclusion on examination of the Constitution, the Criminal Procedure and Evidence Code, the Supreme Court of Appeal Act, judicial pronouncements of this Court and the court below and comparable case law. I was never – in *Letasi v Republic* – influenced by previous comments on *Kumwembe and others v Republic*. Those comments – in time – have been overtaken by a judicial pronouncement of this court. The doubts about the special circumstances approach is doubted by this Court in unanimous judgment in *Tembo v Republic* and a single member of this court in *Kusowa v Republic*. These decisions, not the comments in the Malawi Law Society Google Group, would dominate my reasoning. The earlier comments on the Malawi Law Society Google Group are, therefore, unnecessary to the question to determine. They cannot, therefore, be invoked as grounds for bias.

The Director of Public Prosecutions suggests that in *Letasi v Republic* – where I employed the principle that bail pending appeal is granted, after considering all circumstances, in the interests of justice - I was constrained by that this was a second appeal and that I was constrained by section 7 of the Supreme Court Act. That, however, is strong evidence that when it comes to applying the principles, I was not influenced by the comments in the Malawi Law Society Google Group. In that case, I determined that it was not in the interests of justice to release the appellant because a court, on a second appeal, rarely reviews facts or severity of sentences. The principles were applied neutrally and judicially. In *Helow vs Secretary of State for the Home Department and another*, Lord Rodger said:

In assessing the position, the observer would take into account the fact that Lady Cosgrove was a professional judge. Even lay people acting as jurors are expected to be able to put aside any prejudices they may have. Judges have the advantage of years of relevant training and experience. Like jurors, they swear an oath to decide impartially. While these factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of professional judge was biased. Taking all these matters into account, I am satisfied that the fair-minded observer would not consider that there had been any real possibility of bias in Lady Cosgrove's case.

Intra-judicial and extra-judicial pronouncements

In space, the Director of Public Prosecutions concedes that judges can comment, criticize, research, contribute to discussions and debates about the law. The law could not be otherwise. This is entrenched in rule 4 (2) (of the Code of Conduct for Judicial Officers in Malawi. The media available to judges for such comment, research, criticism, discussion or debates are legion: text books, academic articles, presentations of papers, seminars, group discussions, chamber discussions, fliers, newsletters, to mention some. Since 1994, judges have had to comment and shape law reform. Such judicial contributions and discourses are rewarding to judges and recipients. It would be unexpected that the camaraderie and liberality of such discourses would be fettered by prospect that judges would have to recuse themselves for comments they make on such discourses. This is what the Director of Public Prosecutions wants to achieve – judges should make those contributions to the law at the peril of a recusal. The subject matter for recusal does not certainly include statements like the ones under discussion.

Starting from the statement of the Director of Public Prosecution quotes, the question is whether the conduct – the statements I made – can be a basis of bias. Read the passage in the Supreme Court of Canada in *R v S (RD)* (1997) 3 SCR 484:

Impartiality can be defined as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regards to particular issues.

It is the statement after this that should have preoccupied the Director of Public Prosecution in this application:

Whether a decision-maker is impartial depends on whether the impugned conduct gives rise to reasonable apprehension of bias.

Concerning statements – the conduct impugned – the law cannot be clearer. They are not basis for recusal. In the case of *Locabail (UK) Ltd v Bayfield Property Ltd and another*, the Court of Appeals for England and Wales said:

5 It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly made based on religion, ethnic or national origin, gender, age, class, means or sexual orientation of a judge.

The England and Wales Court of Appeal continued: an objection cannot be soundly made on a judge’s previous judicial decision or utterances (whether in text books, lectures, speeches, articles or interviews, reports or responses to consultation papers):

10 Nor, at any rate ordinarily, could an objection soundly be based on the judge’s social, educational or service or employment or background or history, nor that of Any member of a judge’s family; or previous political association; or membership of a social or sporting or charitable bodies; Masonic association; previous judicial decisions; or extracurricular utterances (whether in text books, lectures, speeches, articles or interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership in the same Inn, circuit, local Law Society or chamber (*KFCTIC v Icori Estero SpA* (Court of Appeal of Paris, 28 June, 1991, International Arbitration Report, Vol. 6#8 8/91). [Emphasis supplied]

The English and Wales Court of Appeals essayed to list some instances – and the one here is not among:

20 By contrast, a real danger of bias might well be thought to arise if there was personal friendship or animosity between a judge and any member of the public involved in the case; or if the judge were closely acquainted with a member of the public involved in a case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of an individual were an issue to be determined by the judge, he had in a previous case, rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person’s evidence with an open mind on a later occasion;

The England and Wales Court of Appeal deals with a situation where the judge expressed views on an issue, we consider this in great detail later:

30 [O]r if on any question at issue in the proceedings before him, the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakaatu v Kelly* (1989) 167 C L R 568)...

The England and Wales Court of Appeals continues with this assertion:

35 [O]r, if for any reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections, and bring an objective judgment to bear on an issue before him.

The England and Wales Court of Appeal then deals with adverse statements made by a judge in the same case:

The mere fact that a judge, earlier in the same case or in a previous case, had adversely commented on a party or witness; or found the evidence of a party or witness to be unreliable, would not, without more, found a sustainable objection.

40 The High Court of Scotland makes a similar statement, discussed fully later in *Hoekstra and Others v Her Majesty’s Advocate*. There are similar remarks in the case of *Vakaatu v Kelly* [1989] 167 CLR 568, discussed later.

45 In the Wisconsin Law Journal, in the article ‘Law review article not grounds for recusal’ there is a discussion of five principles on why Alderman, J, never recused himself – principles which apply to this matter. First, the article or comment must mention the case. The Director of Public Prosecution agrees and the affidavit evidence shows that in all my contributions – which would be the articles that have to be considered – *Kumwembe and others v Republic* is not mentioned. The Director of Public Prosecutions submits that the comment was made on a string on *Kumwembe and others v Republic*. My article in that context would be what I wrote in the many contributions, not other’s articles or contribution. In none of my comments do I mention *Kumwembe and others v Republic*.

50 The second consideration is whether in the article – my contributions – a judge took any position on the issue raised in the case. The issue in *Kumwembe and others v Republic* was whether bail pending appeal should have been granted. To this question a court had to consider whether it was in the interests of justice – even if there were exceptional circumstances – to grant bail pending appeal. Ultimately though the issue was whether bail pending appeal should or should not be granted. The Director of Public Prosecution must admit that I never took any position on this matter. I never said that bail should or should not have been granted. I never even suggested that, based on considerations of interests of justice, bail pending appeal in *Kumwembe and others v Republic* would have or would not have been granted. There is nowhere in my articles – contribution – where I took a position on whether bail should or should not have been granted. As demonstrated, I never, as in ever,

commented on *Kumwembe and others v Republic*. If I took a position, it is on the principle that bail – before and after conviction is granted, after considering all circumstances of the case, in the interests of justice. This, however, is a position on the law and subject to the next principle in the Wisconsin Law Journal.

5 A judge’s position on what the law is cannot be a basis of recusal. Even if a judge took a position in the particular case, a judge’s view of the law is not a basis for disqualification. The position of law I take – unabashedly – is that, based on the Constitution, statute law and the common law of Malawi and elsewhere, bail, after and before conviction or sentence is granted, after considering all the circumstances of the cases, in the interests of justice. This, however, is a view on the law and it cannot found a recusal. What can found a recusal is a discussion of the merits and demerits of the case.

10 This leads to the other consideration in the Wisconsin Law Journal. A judge should recuse if, in the article, there is a discourse on the merits or demerits of the case. A judge will not, therefore, recuse if in the article there is no discussion on the merits or demerits of a case. Looking at my articles (contribution) on the Malawi Law Society Google Group, nowhere is there a discussion on the merits or demerits of *Republic v Kumwembe* or *Republic v Kasambala*.

15 The last consideration from the Wisconsin Law Journal is the principle that, even if a judge commented on the specific case, another judge, much like the recusing judge, will be bound by precedent, statute and the Constitution and not by views externally expressed – except, of course, where a principle is not covered by the Constitution, legislation or common law. In the latter case, a published article is a source of law – authoritative source.

The judgment of the court below, albeit not binding on this court or judges of the same court, was a precedent, law and part of Malawi jurisprudence. It was, therefore, as such precedent, amenable for academic, research and extrajudicial comment. Comments, by judges or others on it cannot, without more, be bias or proof of it.

20 The Director of Public Prosecution relies on *Hoekstra and Others v Her Majesty’s Advocate*. There, unlike in this case, there was more. There are four aspects – going to the root of the decision – that distinguish that case from the present: the timing of the comments, the language used in the comment, what the comment covered, and the nature of the comment. The timing was discussed earlier.

Lord McCluskey’s comment was on a body or branch of laws – the European Convention – not on a specific principle of law. The England and Wales Court of Appeal stresses this in many passages in the judgment:

25 The common factor in each of these issues is the reliance which counsel for the appellant placed on the European Convention. The Advocate Depute who appeared before us did not dispute that Convention-based arguments had been at the forefront of the submissions on these points.

The England and Wales Court of Appeals reiterates this in the next passage

30 For these reasons we approach the question on the basis that, because of the article by Mr McCluskey, the particular bench of the High Court cannot be properly regarded as being or having been objectively impartial in relation to the Convention issues in the appellants’ appeal, we must set aside the decision of 28 January and direct that the appeal, including those issues covered by that earlier decision, should be heard before a different constituted court.

The England and Wales Court of Appeals is more pronounced in the next passage:

35 But the article does not remain among the topless towers of Ilium; it moves to a different level with the references to the Convention offering a field day for crackpots and being a pain in the neck for judges and a goldmine for lawyers. The implication was, said Dr. Sjocrona, that parties, such as the appellants, who advanced arguments based on the Convention were crackpots and that their lawyers who advanced those arguments were also crackpots, but crackpots for whom the Convention was a goldmine. Nor was this to be dismissed as a passing fancy of the judge: it was presented as a settled view which he had expressed in 1986 – and he had proved a true prophet. Again this inevitably gave rise to questions about Lord McCluskey’s ability, when sitting on the bench, to set aside these firmly-held negative views of the Convention and of those who seek to invoke it. Those questions were made all the more insistent when the article purported to give the “Verdict” of Lord McCluskey, pictured in his judicial wig.

The England and Wales Court of Appeals further states:

50 It appears to us that the article, published very shortly after the decision in the appeal, would create in the mind of an informed observer an apprehension of bias on the part of Lord McCluskey against the Convention and against the rights deriving from it, even if in fact no bias existed in the way in which he and the other judges had actually determined the scope of those rights in disposing of the issues in the case.

The English and Wales Court of Appeals stresses Lord McCluskey’s antipathy to the Convention:

We stress that, in reaching this conclusion, we attach particular importance to the tone of the language and the impression which the author deliberately gives that his hostility to the operation of the Convention as part of our domestic law is both long-standing and deep-seated.

5 That the case concerns criticism of the body of laws is even more conspicuous in part of what the *ratio decidendi* of the decision. The England and Wales Court of Appeal recognises the right of a judge to comment on the development of the law *en masse* and stresses the scope of the criticism of bodies or branches of law:

10 It is well known that in their extra-judicial capacity many prominent judges – not only in England – publicly advocated incorporation of the Convention and equally publicly welcomed the Government’s decision to incorporate. But what judges cannot do with impunity is to publish either criticism or praise of such a nature or in such language as to give rise to a legitimate apprehension that, when called upon in the course of their judicial duties to apply that branch of law, they will not be able to do so impartially.

The England and Wales Court of Appeal recognises that in relation to specific laws, such comments are within the anvil of a judge and cannot be a basis of disqualification or recusal:

15 Indeed criticism of particular legislative provisions or particular decisions is often to be found in Judges’ opinions.

My article was about a specific law – the interests of justice when granting bail. It was not even a criticism of the law. Mine was a mere comment on the law. Lord McCluskey’s comments were about a whole branch of law to be applied in the realm – the European Convention.

20 This leads to the second aspect that distinguishes this case from *Hoekstra and Others v Her Majesty’s Advocate* Lord McCluskey’s article was a comment on a law that was developing. My observations were on a law settled. This is what the English and Wales Court of Appeal said:

25 Judges, like other members of the public and other members of the legal profession, are entitled to criticise developments in our law, whether in the form of legislation or in the form of judicial decisions. Indeed criticism of particular legislative provisions or particular decisions is often to be found in Judges’ opinions. Similarly, judges may welcome particular developments in our law. It is well known that in their extra-judicial capacity many prominent judges – not only in England – publicly advocated incorporation of the Convention and equally publicly welcomed the Government’s decision to incorporate.

30 The England and Wales Court of Appeals came to the conclusion it did mainly because of Lord McCluskey’s language and his deep-seated views and detest of the European law. The court accepted the lurid description of the language by the appellants counsel. The then Court said:

35 We stress that, in reaching this conclusion, we attach particular importance to the tone of the language and impression which the author deliberately gives that his hostility to the operation of the convention as part of our domestic law is both long-standing and deep-rooted ... But what judges cannot do with impunity is to publish either criticism or praise of such a nature or in such language as to give rise a legitimate apprehension, that, when called upon in the course of their judicial duties to apply that particular branch of the law, they will not be able to do so impartially.

Consequently, comments, with moderation, which point to lacuna or state of law are innocuous:

40 The position would have been very different if all that Lord McCluskey had done was to publish, say, an article in a legal journal drawing attention, in, moderate language, to what he perceived to be the drawbacks of incorporating the Convention into our law.

In *Helow vs Secretary of State for the Home Department and another*, Lord Mance, concerning the language used, said:

It is no doubt possible to conceive of circumstances involving words or conduct so extreme that members might be expected to become aware of them and disassociate themselves by resignation if they did not approve or wish to be thought to approve of them.

45 The language and the conclusions the High Court of Australia in *Vakaatu v Kelly* are in this statement of the court:

50 The learned trial judge’s adverse comments about Dr. Lawson, Dr. Revai and Dr. Dyball in the course of the trial of the present case were indeed strong: “that unholy trinity”; the G.I.O’s “usual penal of doctors who think you can do a full week’s work without any arms or legs”; whose “views are almost inevitably slanted in favour of the GIO by whom they have been retained, consciously or unconsciously. “His honor indicated that he regarded those three medical practitioners as failing within a “particular category of doctors” to whom he had an adverse attitude. He stated that he express his views for the benefit of the present parties in the negotiations which were taking place. “The implication of that last comment would seem to have been that the parties should negotiate any

settlement on the basis that his Honor would not be influenced by what those three doctors might say in evidence. In the event, only Dr. Lawson was called to give oral evidence. Dr. Lawson Revai's written report was received in evidence. No evidence from Dr. Dyball was received...

5 While, as we have indicated, the line between comments which would likely to have that effect and
comments which would not is necessarily an imprecise one, we have come to the conclusion that,
when they are read in the context of what was said in the course of the trial, his Honor's comments
in his judgment fall on the wrong side of the line. In particular, it seems to us that such a lay
observer would be likely to see the derogatory and wide-sweeping reference to Dr. Lawson in the
10 judgment- "Even Dr. Lawson"; his evidence, which was as negative as it always seems to be – and
based as usual upon his non-acceptance of the genuineness of any plaintiff's complaints of pain"
(emphasis added) - as indicating that his honor was concerned to vindicate his preconceived and
very strong adverse views about the reliability of Dr. Lawson as a witness and had allowed those
views to prejudice his whole approach to the case to the detriment of the defendant. An experienced
15 lawyer would appreciate the ability of a trial by prejudgment or bias ... To borrow and adapt words
used by Mahoney J.A in his dissenting judgment in the Court of Appeal, the comments in the
judgment were such as to cause "reasonable apprehension" on the part of a lay observer that the
judgment itself was, "in the end", affected by bias.

20 My article is bereft of the excessive language and tone which was Lord McCluskey's or those that were of the Australian trial judge.
My article brings to bear what constitutionally and at common law is the basis on which courts grant bail. My comments on the law were calm,
principled and far from the inflammatory of Lord McCluskey. In any case, my comments were not on upcoming law, they are on existing law and
law that –sitting in an intermediate appeal court and now the apex appeal court I am called upon to develop. Judges' honest and fair
understanding of what the law is are not subject of bias and, therefore, cannot be a basis of recusal. My understanding of section 42 (2) of the
Constitution, section 24 (1) of the Supreme Court of Appeal Act and specifically this Court's decision of *Chihana v Republic*, the lead
case approved by the same court is that granting bail pending appeal bases on the interests of justice.

25 Precedents establish the law and principles contained there. These laws and principles are neutral. The process of arriving at them –
judicial and legal reasoning cannot be subjected to allegations of bias – legal or judicial reasoning can be faulted, for error, but not for bias.

30 It is, therefore, strange for the Director of Public Prosecution to suggest that I am so biased. The most that the Director of Public
Prosecution can say is that she disagrees, given contrary views, with the law as I have stated it and because of the reasoning I employed to come
to that conclusion. In 'Bias and previous determinations: four recent decisions in the Court of Appeal and Privy Council,' Civil Justice Quarterly,
2015, Heaton, quoting Higgins in 'BATAS v Laurie: Apprehended Bias and Actual Failure of Case Management,' 2011 (30) Civil Quarterly
Review, 246, 249, says:

35 Debra Bassett has suggested that bias means having "a preconceived opinion" or "a predisposition to
decide a cause or an issue in a certain way, which does not leave the mind perfectly open to
conviction. However, these definitions suggest that a judge must come to a case with an open mind,
which is wholly unrealistic and does not represent the law ... A judge would be expected, for
example, to decide a contentious question of law in the same manner as they have done previously
(unless reversed on appeal). In that situation, the judge's mind is not "perfectly open" and the judge
definitely has a preconceived opinion, be this would not generally as bias. Indeed, the administration
of justice would come to a grinding halt if this was required. As Higgins rightly says, the possibility
40 that the judge will reach the same conclusion the second time around is not the same thing as
suggesting that they might "not revisit the same issue with ... an open mind.

45 Seen from that *Kumwembe and others v Republic* is a precedent, the way to challenge my comments is not, as the Director of Public
Prosecution planned to do, to allege bias but to embolden the conclusion by challenging the reasoning to the contrary. One would have thought
that the better challenge would be with the one who espouses the contrary view than those who have less clue on the subject. It is this challenge
that the Director of Public Prosecution wants to avoid – by asking for my recusal. To do so, there is recourse to an unnecessary, outdated
comment made.

50 With due respect to the Director of Public Prosecution, the comments in Malawi Law Society Google Group – that the court considers
special circumstances – are superseded by Supreme Court of Appeal decisions made after *Chihana v Republic* – *Tembo v Republic*, *Suleman v
Republic*, *Kusowa v Republic* and *Letasi v Republic*. It is absolutely unnecessary, to an informed fair-minded observer therefore, to even regard
comments in the Malawi Law Society Google Group made many months before this application as basis for determining the present application
and, by extension, recusal. In *Letasi v Republic* I actually refer to both decisions of the court below.

55 Reference to the cases of *Republic Kumwembe* and *Republic Kasambala* in the Supreme Court in *Letasi v Republic* was not with the
view of confirming or reversing the orders the court below on bail pending appeal. It was a review of all decisions of the court below and this
court – a literature review. I did not decide on anything on the matter.

Even if I did, this is an application for bail pending appeal. Bail applications can repeatedly – and it is advisable to do so – be made to
the same judge. The question about bias from a previous decision does not arise and so does not the related question of *res judicata*. The Director
of Public Prosecution cannot raise, for recusal, on a bail application, previous decisions – as bias – for a judge to consider or reconsider a
subsequent bail application. Consequently, even if I had decided – which I did not – one way on the *Kasambara* or *Kumwembe* cases, I could still

decide the bail application, not once, not twice, not three times but as many times and for as long as the appeal is subsisting – this is the nature of this ancillary relief – called bail pending appeal.

As earlier stated, the comments the Director of Public Prosecutions relies on are otiose given that those principles are now the law. Whatever the uncertainties in the court below, of which the decisions in the court below are its evidence, the court below now acts in accordance with what the Supreme Court has said. Sections 42 (2) (f) (viii) and (x) indicate that a convicted person is an accused person for all purposes, including the right in section 42 (2) (f) of the Constitution. An accused person, appealing against sentence or conviction, applying for bail pending has the same right to bail under section 42 (2) (e) and subject to the interests of justice. This interpretation, as demonstrated in the court below, is supported by internationally decided cases. There is nothing in section 42 (2) of the Constitution to restrict the right to release on bail to before conviction. The right inures before and after conviction and on either occasion, the principle is in the interest of justice. The right is created in absolute terms and can be adumbrated by law subsidiary.

There is legislation affecting the right – that legislation deals with bail before and after conviction. Section 118 of the Criminal Procedure and Evidence Code, read together with the Bail Guidelines Act and the Bail Guidelines, and sections 161 A-J of the Criminal Procedure and Evidence Code deal with bail applications before conviction. The constitutional notion of interests of justice is stressed by the Bail Guidelines Act and the Bail Guidelines. The notion of interests of justice notion inures in section 161A-J of the Criminal Procedure and Evidence Code but only in considering whether to release the accused person absolutely or on bail – an undertaking by the accused person to appear for hearing.

Section 355 (1) of the Criminal Procedure and Evidence Code covers bail after conviction in the High Court and subordinate courts:

Subject to this Code, neither a notice of intention to appeal given under section 349 nor a petition of appeal under section 350 shall operate as a stay of execution of any sentence or order, but the subordinate court which passed the sentence or made the order, or the High Court, may order that any such sentence or order be stayed pending the hearing of an appeal and if the appellant is in custody that he may be released on bail, with or without sureties, pending such hearing.

Section 351 (1) of the Criminal Procedure and Evidence Code does not state what the test is. Silence does not mean ouster of the constitutional principle of the interests of justice. Section 351 (1) of the Criminal Procedure and Evidence Code must, therefore, be read subject to the constitutional provision – section 42 of the Constitution – and bail, even where it is pursuant to stay of execution of a prison sentence, will be granted by the High Court or courts subordinate to it, under section 351 (1) of the Criminal Procedure and Evidence Code be granted in the interests of justice.

Besides, if the test is to be established by the courts, our courts, in developing the common law, must, under section 10 (2) of the Constitution, regard the Constitution and principles of the Constitution – that bail will be granted in the interests of justice. There is a similar obligation on the legislature, under section 10 (2) of the Constitution, to incorporate the interests of justice principle in bail legislation. There can always be a presumption that the legislature, when passing legislation, regards the Constitution and principles of the Constitution. One enduring principle – rising to universality – is that bail is granted in the interests of justice.

These comments about the law are not to preempt arguments on what now seems to be the view of this Court that all circumstances – not only special ones – must be considered and bail will be granted in the interests of justice. The comments fulfil only one endeavor, namely, that to hold this view – even if others do not – cannot be bias on a view. This view is supported constitutionally, statutorily, the common law of Malawi and others and internationally decided case. Those who hold this view and those who do not are not biased – one way or another.

To state these principles cannot be construed as bias. If the Director of Public Prosecutions thinks, differently, she has to raise, for my consideration, those views. The exercise, given the Supreme Court decisions, one of which is my decision, will be difficult but by no means insurmountable. Bias, however, cannot be premised on that, sitting as a judge of a court, I have, by judicial pronouncement, stated the law to be that even for bail pending appeal, the test is whether release on bail is in the interests of justice. There is no statute that surpasses this universal constitutional requirement.

The Director of Public Prosecution assumes that the interests of justice requirement is less onerous for a convict? Or is it just from a general feeling expressed in the commentary, to wit, the law in Malawi and England is that once you are convicted, you must serve a prison term? Certainly, with due respect, this is neither the law of Malawi nor England. Sections 351 (1) of the Criminal Procedure and Evidence Code and section 24 (1) of the Supreme Court of Appeal Act – providing for stay of sentences of imprisonment and release on bail pending appeal suggest the opposite. Sections 333-340 of the Criminal Procedure and Evidence show that this is not the law. The law of England and Malawi is the same – a court can release, in the interests of justice – on bail pending appeal.

Conclusion

This, most certainly, is not a case where I have any interest, however described, in the outcome. This is, therefore, not a case of automatic disqualification or recusal. At the most it is a case of apprehension or possibility of bias. In this respect, therefore, there must be proof of conduct for such apprehension or possibility. The conduct complained of are extra-judicial or intra-judicial. Intra-judicial assertions, without more cannot be a basis for a recusal or disqualification. Extra judicial statements must, however, be proved and seriously. In this particular case,

5 none of the contributors on the Malawi Law Society Google Group having commented on *Kumwembe and another* and *Kasambara vs Republic*, it is statements made on the Malawi Law Society Google Group or in *Letasi v Republic* that matter. The statements in the Malawi Society Google Group are affected by effluxion of time and subsequent Supreme Court of Appeal decision. Statements made in *Letasi v Republic* are sacrosanct from being a basis for the disqualification or recusal. A fair minded observer, once informed that such pronouncements cannot base disqualification or recusal cannot, without more as to language or tone, find that there is a possibility or apprehension or bias in this matter. The application for recusal is, therefore, refused.

Made this 12th Day of August, 2017

D F Mwaungulu

JUSTICE OF APPEAL

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