**IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE**

**MSCA Civil Appeal No. 10 of 2011**

**Between:**

**Catherine Mthawanji and Others.....Appellant/Applicant**

**And**

**The Republic.....Respondent**

**Coram:Honourable Justice A.C. Chipeta SC, JA**
Goba Chipeta, of Counsel for the Appellant
Kuyokwa, Senior State Advocate, of Counsel for the Respondent
Masiyano(Ms), Court Clerk

## RULING

I heard this matter on 5th June, 2020. I postponed it for ruling to today. That is because I was soon thereafter proceeding on leave. It is an application for bail pending the determination of an appeal. The applicant is Francis Nkhoma, one in a team of persons that were jointly tried for Murder in the High Court. Seeing it as a possibility that as I was away on leave the Court panel that heard the appeal could deliver the pending judgment and thereby resolve the applicant's anxiety, I made my today's delivery of the ruling conditional on the judgment in question still being pending as at the time of calling the matter before me. I will

now proceed to pronounce my ruling because I have just ascertained that the appeal judgment is still pending.

As I had observed in the Interim Order I made on 5th June, 2020, the parties to the application each filed an affidavit and skeleton arguments in support of their respective opposing stands on it. They also each presented me with oral arguments in the application. I have fully reflected on all those arguments. I intend, if I can, not to be too long or academic about the issue at hand.

I notice that all in all the applicant has given three reasons for wishing to be released on bail pending the judgment in this matter. To me the reasons he has presented as the first and the second are strictly speaking just one reason. They are closely intertwined with each other, and they both raise one and the same concern. I will therefore treat them as between them advocating one reason only. The substantive complaint the applicant raises is that it is now five years since his appeal was heard. He has no idea when he will get judgment in the said appeal. As a result, he apprehends, that should he in the end emerge successful, his constitutional rights to a fair trial and to access to justice will have been grossly violated. The State's concern is whether releasing the applicant now would be in the interests of justice. On its part, the State answers that question in the negative. The best, it believes, is that the Court should just set a new date for the delivery of judgment and thus be done with the matter.

As for the third reason the applicant has given for bringing this application, which I will treat as his second reason, it has something to do with the recently declared pandemic of covid-19. Due to overcrowding and other poor conditions in prison he fears that the risk of him contacting the disease while in Prison is higher than it would otherwise be if he is let out on bail. Well, I am not sure if suspending prisoners' sentences is the best, or the only, way they can be helped to

avoid contracting covid-19. While it is probably true that conditions outside prison might be more conducive to the attainment of that objective, it should be borne in mind that suspending sentences that have been imposed on convicts willy nilly on account of the pandemic could also have negative effects on the attainment of justice, which is an objective such sentences are meant to serve.

There is, after all, no 100% guarantee that once someone goes outside prison walls then he becomes safe from contracting the disease. What must be of greater assurance to any fearing individual, whether he be in or outside of prison, it would appear, is his measure of adherence to the precautionary measures he is supposed to undertake against contracting an infection. Thus, while decongesting prisons on account of covid-19 may be ideal for inmates that committed petty crimes and who are on relatively short punishments, it might not necessarily be the ideal solution for every other category of prisoner. I certainly do not think it would serve the interests of justice if this reason for seeking bail was to be indiscriminately extended to virtually every other prisoner regardless of the gravity of the crime they are serving their sentence for and regardless of the length of sentence they were awarded.

In the instant case, where we are talking about murder as the crime the applicant was tried for, we are not talking of petty crime. It has also come to light that for the particular murder that is in issue the applicant was sentenced to a duration of 30 years imprisonment. This is a heavy sentence that I cannot in any way be persuaded to either view lightly or casually. The long and short of this is that if the only reason the applicant had given me for seeking bail in this matter was his intended flight from contracting covid-19 inside the prison walls, I would not have had any difficulties in dismissing his application. I will thus not pay any further attention to this reason for bail in my determination of this application.

I am thus left with one complaint to revert to and consider in this application before I can dispose of it. This is his complaint about his long wait for his judgment in the appeal and its possible detrimental consequences on his constitutional rights should he succeed in the appeal. Before doing so, however, in the light of some of the arguments and authorities the parties visited me with, let me come into the open about how I view bail applications of the type that is before me. Bail pending appeal or, as is the case here, bail pending the determination of an appeal, is different from bail prior to an applicant's trial or during the course of an applicant's trial. The distinction lies in the fact that in the pre-appeal scenario, the application comes once the applicant has already been proved guilty beyond a reasonable doubt and been convicted and awarded punishment by a competent Court of law; whereas in the other case (i.e the pre-trial or pre-conviction scenario) the bail application comes up to Court before there has been any proof of guilt laid down before the Court. Incidentally, that is at a time the law still presumes the applicant accused to be an innocent person.

Now, although I am very agreeable to the fact that in either case of bail application (pre and post conviction) the grant or refusal of bail should be governed by the interests of justice, I am of the definite view that these interests of justice cannot be the same both before and after conviction. For applicants who are merely criminal suspects, whom the law deems innocent until proved guilty, I have no doubt that as was lucidly pronounced by the Supreme Court of Appeal in **Mvahe vs Rep** [2005] MLR 291 and in multiple sequel cases, it is up to the State, if it objects to bail, to show that it would be against the interests of justice for the Court to release the applicant on bail. However, *vis-à-vis* applications for bail by persons who have already been convicted i.e those who are no longer deemed to be innocent, but who have already been proved guilty beyond a reasonable doubt, I would not subscribe to the school of thought to the effect that they too are entitled to be vetted by the **Mvahe** case test.

In my understanding of the law, once the State has ably and successfully shouldered that heavy burden of proving an accused person guilty of crime and landed him in prison, it should no longer be its burden in a bail application that person subsequently takes up to show to the Court that it would be against the interests of justice to refuse him bail. It only makes sense on such occasion that the burden to show that should be borne by the convict that seeks to be released. Being the proven offender that has already been awarded his legally due punishment, he at that stage is the one who must show the Court that letting him loose either before the disposal of his appeal, or before the completion of his sentence, would be in the interests of justice. I dare say that it is on this account that phrases like the applicant is required to show *special* or *exceptional* circumstances before he can in such instance secure bail have surfaced in multiple determinations of post-conviction bail applications. I must say, therefore, that I sincerely subscribe to this view.

That said, it is my judgment that there is compelling merit in Frank Nkhoma's quest for bail in this case. His complaint against his continuing to await the fate of his appeal while actively serving his sentence beyond the five years he has been doing that same waiting since the hearing of his appeal amounts to a genuine concern that deserves interim relief. Although being a Judge outside the Court panel that heard his appeal I am in no position to assess what prospects for success his appeal enjoys, what is plain to me is that it would be overtly cruel and unjust to deny him the relief of release on bail he desires pending whatever fate will come his way when the judgment in the appeal he argued gets to be delivered. As I see it, the ball at this point in time about when that judgment will come, as has been the case the past five years, is not in the applicant's court. It is, and has in all that time, been in the hands of the Court that heard him. Thus, should the applicant indeed succeed in that appeal, a great portion of the five years that he has been serving his sentence since the hearing of his appeal will have been needlessly served.

It is consequently my judgment that the applicant should go on bail until such time as the Court that heard his appeal calls him back to pronounce its decision in the appeal. What this means is that if the applicant's appeal succeeds and his conviction is quashed and his sentence set aside, this bail will have saved him from suffering imprisonment for a period of time longer than that which he has already undergone so far. It also, however, means that should his appeal fail, the disadvantage he will have to bear is that the luxury time he will have enjoyed whilst on bail shall have to be discounted from the total period of imprisonment the appeal judgment will in the end settle as his rightfully deserved punishment in this matter.

I will now proceed to set the conditions Francis Nkhoma must comply with when he so goes on bail pending the determination of his appeal. Since I have not had access to the file on which he his appeal, I direct that such Registrar of this Court as will undertake to examine the sureties that must back the applicant in his bid for bail should access the file and ascertain all particulars of the applicant so that, depending on the location of the abode he will spend his bail time at, the Registrar can assign him a Police Station to be reporting to during the subsistence of the bail. Post this ascertainment:

(a) Francis Nkhoma shall before the designated Registrar enter into a bail bond in the sum of K500,000.00, of which he must deposit K200,000.00 in Court and remain with a non-cash balance of K300,000.00, the said balance being recoverable from him for forfeiture purposes only on breach of the said bail bond

(b) He should then furnish to the said Registrar two sufficient sureties for examination *vis-à-vis* their fitness to undertake the responsibilities that attach to sureties for bail. The said sureties if found satisfactory sureties, to be each bound in the sum of K500,000.00 of which they must each deposit K200,000.00 in Court and remain with non-cash balances of K300,000.00 each that will

only be recoverable from them for forfeiture purposes on breach of the bail bond

(c) That he should surrender to this Court his Passport or other Travel Documents, if he has any, for safe-keeping until the determination of his appeal

(d) That he should be reporting in answer to his bail bond to a Police Station the Registrar will ascertain and specify in the bail bond to be near his next place of abode once a month every Friday in the third week of the month during working hours before noon.

(e) That he should not travel outside the District (to be specified in th bond) within which he will have his abode without first informing the Officer-in-Charge of the specified Police Station about both the destination and the duration of such intended visit out, and

(f) That in the event that he faithfully complies with all his conditions of bail herein, Frank Nkhoma should, after the delivery of the appeal judgment, recover his deposit of K200,000.00 as well as his passport and or travel documents from the Court; his sureties too will, in the event of the bail bond herein not being breached also be entitled to claim refund of their K200,000.00 bail bond deposits from the Court once judgment has been delivered.

I order accordingly.

Made in Chambers (*Open Court per Covid-19 Judiciary measures*) the 10th day of July, 2020 at Blantyre

**A.C. Chipeta SC**
**JUSTICE OF APPEAL**