IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA Criminal Appeal No. 20 of 2016

(Being High Court of Malawi, Principal Registry, Crim Appeal No. 16 of 2014)

And

(Being Criminal Case No. 122 of 2014, Principal Resident Magistrates' Court, Blantyre)

Between:

Jonathan Mekiseni.....1st Appellant/Applicant

Ditter Sitima.....2nd Appellant /Applicant

Jekapu Joseph.....3rd Appellant/Applicant

Hastings Mwinjiro.....4th Appellant/Applicant

And

The Republic.....Respondent

Coram: Honourable Justice A.C. Chipeta SC, JA
Maele, of Counsel for the Appellants/Applicants
Salamba, Principal State Advocate, of Counsel for the Respondent
Chimtande (Mrs)/ Masiyano (Ms), Court Clerks

RULING

The four applicants herein, namely Jonathan Mekiseni, Ditter Sitima, Jekapu Joseph and Hastings Mwinjiro, seek to be released on bail pending the delivery of their judgment in an appeal they already argued before this Court. They were initially tried and convicted of the offence of Robbery in the Principal Resident Magistrates' Court sitting at Blantyre, where they were sentenced to varying durations of imprisonment. The High Court, Principal Registry, subsequently dealt with the appeal they lodged against both convictions and the sentences and dismissed them all in their entirety.

Having lodged a further appeal to this Court, the applicant's sought bail pending appeal in the High Court. The application was dismissed. They then repeated that application before a single Judge of this Court. The application was likewise dismissed. Their appeal was then set down and heard on 13th June, 2017. On 21st March, 2019 judgment in the appeal was due to be delivered, but it was not delivered. Seeing that no other date has since been set down for the delivery of the judgment, and that by now some 37 months have gone past since the hearing of the appeal, they have taken up a second application before a single Judge of this Court for them to be considered for bail pending the delivery of the judgment they are still awaiting.

The application herein has been based on Section 24 of the Supreme Court of Appeal Act (Cap 3:01) of the Laws of Malawi as read with Order IV rule 2 of the Supreme Court of Appeal Rules. It is supported by an affidavit carrying a number of exhibits as well as by skeleton arguments. The gist of the prayer for bail is exhaustion on the part of the applicants in waiting for their judgment. The length of time they have waited in light

of their failure to get feedback from the Court on the reminders they have sent to it about the outstanding judgment makes them very uncertain about when actually judgment will be delivered in the matter. Consequent upon this, their fears are that should the judgment get delivered after all or some of them have completed their sentences, and should it result in either a quashing of their convictions or a setting aside/ reduction of their sentences, then they will needlessly either have served in full sentences that might end up being wholly undeserved or served long portions of sentences in excess of those sentences that might end up being reduced. They have, they argue, a right to a fair trial, which includes the right to appeal. The long delay in determining their appeal, they complain, violates this right.

They pray, therefore, that in the interim they be granted bail pending the delivery of the judgment that they are waiting for in this appeal. Should their sentences survive that judgment, they reason that it will just be a question of them returning to prison to resume their sentences and finish off the balances remaining as at the time of release on bail. That, they believe, would save them from a possible scenario of serving their sentences in full and then being acquitted when they have served their full terms or serving their sentences in full when the appeal judgment might give them a discount on some of those sentences.

On the date of hearing, to demonstrate that their fears are real, the applicants brought in aid two High Court determinations that are related to the kind of mishap they fear. The first is the case of **Nicholas Treva Malunga vs Attorney General** Civil Cause No. 85 of 2018 (High Court, Principal Registry - unreported). In that matter judgment for liability having been entered by a Judge for a delay by the High court in the delivery of an appeal judgment on defilement conviction that saw the

claimant to completion of his sentence, damages were on 23rd July, 2018 assessed at K5,000,000.00 by an Assistant Registrar.

The second case is that of **Limbani Zuze and Shalome Kumwenda vs Rep** Criminal Appeal No. 98 of 2016 (High Court, Mzuzu Registry - unreported). The two had been under terms of imprisonment for housebreaking and theft Counts with effect from their date of arrest in June, 2016 following criminal proceedings that had taken place in a Magistrates' Court. Having appealed to the High Court against the convictions and sentences judgment was only delivered on 3rd July, 2020. At that point all housebreaking convictions were quashed, with their sentences set aside. Further, *vis-a-vis* the theft convictions, even though they were confirmed, their sentences were drastically reduced. It turned out that they had by then already served longer sentences than the appeal judgment decreed they deserved. As a result, the appeal Court had no choice but to release them forthwith the very day the appeal judgment was pronounced. In this matter, the applicants believe that being granted bail pending the delivery of the pending judgment can save them from following in the unfortunate footsteps of the above-cited case authorities.

The State is opposed to the prayer of the applicants proposing that they be released on bail. In an affidavit, as well as in the skeleton arguments it has filed in the matter, the respondent points out that the applicants having been convicted and sentenced for Robbery in the Court of first instance, their appeal against those convictions and sentences was dismissed for lack of merit in the High Court. Hereafter, while agreeing that post the hearing of the appeal in the Supreme Court of Appeal it has indeed taken long for judgment to be delivered, the State's view is that this does not in itself amount to a valid reason for the applicants to be

released on bail. It suggests, instead, that the applicants should continue pleading with the Court for the delivery of the outstanding judgment.

Citing a number of case authorities from both the High Court and the Supreme Court of Appeal, including that of **Sulemani vs Rep** [2004] MLR 398 (SCA), which have emphasized the need for an applicant for bail under Section 24 of the Supreme Court of Appeal Act to show exceptional circumstances to earn that relief, the respondent opines that the applicants have not met the requirements of the said test. It also observes that the applicants have not brought to the attention of the Court any prospects of success they might have in the appeal. In the end it is the State's prayer that the application for bail pending delivery of judgment herein should be dismissed, and that instead the Court should just expedite the delivery of its judgment.

I should disclose that I am in the unfortunate position that the application herein fell on my lap merely by virtue of my being the Motion Judge at the time of its filing, even though I did not sit on the panel that heard the appeal it refers to. I thus have no idea how soon the judgment in question can be delivered. I merely have judicial notice of the fact that one of the Judges on the material panel is currently out of the jurisdiction. This notwithstanding, I need to assess the application as it stands, and on that basis to do what is the right thing to do in the prevailing circumstances. As it is, my first finding in this matter is that it is premised on a correct legal provision. Section 24, especially through its subsection (1) of the Supreme Court of Appeal Act, is the most suited provision for the kind of application the applicants have brought up. It specifically confers jurisdiction on this Court to deal with bail applications that are made when only a determination is pending in a criminal appeal, as is the case in this matter.

Now, while the fact that the applicants have pegged their application on a valid legal provision, it remains to be seen if they have also satisfied the conditions it prescribes for the granting of bail. Having said that, I recall that just a month ago or thereabouts I had occasion to deal with a similar application. That was in MSCA Criminal Appeal No. 10 of 2011, **Catherine Mthawanji and Others vs The Republic,** where an appellant named Francis Nkhoma sought bail pending the delivery of judgment in a murder appeal that he and others had argued before the Court five years earlier. The only difference between that case and this one is that in this case it is only three years and a month or thereabouts that have elapsed since the appeal was argued, rather than the longer period of five years. The two cases are otherwise on all fours with each other. It is, I believe expected of Courts, in the absence of special reasons, to treat like cases alike. The legal provision that empowers this Court to consider bail applications that are taken out pending the determination of an appeal, permit the Court to only so grant bail *if it deems fit.*

In considering whether I have been given sufficient reasons to *deem it fit* to release the applicants on bail, the 37 months the applicants have so far waited for the determination of their appeal to be pronounced has heavily weighed on my mind. Those many months represent a lot of waiting in idleness by them while they are totally ignorant about whether the judgment to come will bring them good news or bad news, whenever it will come. This suffering is being borne by the applicants when they have not done anything to contribute to it, as they already did their part by arguing their appeal and then beginning to wait for the outcome.

In my view this kind of suffering in silence and uncertainty by far outweighs the fact that being convicts these applicants cannot any longer be viewed as innocent individuals, their guilt for crime having already proved beyond a reasonable in a Court of law. This notwithstanding, it is my judgment that the ordeal they have gone through, and are still going through without knowing when it will end, amounts to such special or exceptional circumstances as do now persuade me to *deem it fit* to, in line with the prayers raised in their application, release them on bail pending the delivery of judgment by the Court in their appeal. Their application thus succeeds and I grant them bail on conditions I will immediately list.

Before I can set the terms of the release of the four applicants herein on bail, however, I must confess that with no access to their appeal file I do not have details of where each one of them hails from. Unfortunately, even the application they have filed has not put forward any information of their likely places of abode in event of them being successful in it and being ordered to be released on bail. I thus direct that such Registrar of this Court as will undertake the examination of the sureties that will come to back the applicants in the bail bonds they must enter into, should access the relevant file and ascertain all the particulars of the applicants. That should then enable the said Registrar to assign to each applicant a Police Station that is nearest to his intended place of abode for him to be reporting to during the subsistence of this bail. Once these details have been ascertained:

(a)The Applicants must each before the designated Registrar enter into a bail bond in the sum of K350,000.00, of which they should each deposit K100,000.00 into Court and remain with a non-cash

balance of K250,000.00, the said balance being recoverable from them for forfeiture purposes only on breach of bail bond

(b) They should then each 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, to be each bound in the sum of K350,000.00 of which they must each deposit K100,000.00 into Court and remain with non-cash balances of K250,000.00 each that will only be recoverable from them for forfeiture purposes on breach of the bail bond

(c) That they should each surrender to this Court their Passports or other Travel Documents, if they have any, for safe-keeping until the determination of their appeal

(d) That they should each be reporting in answer to their bail bonds to a Police Station the Registrar will ascertain and specify in the bail bonds to be near each one's place of abode during the subsistence of the bail granted. This they should do during working hours before noon once a month every Friday in the third week of the month.

(e) That they should each desist from travelling outside the District (to be specified in the bond) within which they will each have their place of abode, unless they first inform 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 they each faithfully comply with all the conditions of bail herein, they should, after the delivery of the appeal judgment, recover their deposits of K100,000.00 each as well as their passports and/or other travel documents from the Court, if any exist and get deposited with the Court; their sureties too will, in the event of the bail bonds herein not being breached, also each be entitled to claim refunds of their K100,000.00 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 24th day of August, 2020 at Blantyre

A.C. Chipeta SC
JUSTICE OF APPEAL