IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA Criminal Appeal No. 1 of 2020

(Being High Court of Malawi, Lilongwe District Registry, Criminal Case No. 125 of 2015)

Between:

Cornelius Kaphamtengo..... 1st Appellant/Applicant

Conrad Nambala.....2nd Appellant/Applicant

Chikondi Chimutu.....3rd Appellant/Applicant

And

The Republic.....Respondent

Coram:Honourable Justice A.C. Chipeta SC, JA
Maele, of Counsel for the Appellant/Applicant
V. Chirwa, of Counsel for the Respondent
Masiyano, Court Clerk

RULING

Cornelius Kaphamtengo and his two co-applicants have taken out an *inter-partes* summons for bail pending the determination of their appeal in this Court. They have founded it on Section 24 of the Supreme Court of Appeal Act (Cap 3:01) of the Laws of Malawi. This application being a

matter that does not involve either the hearing or the determination of an appeal, it came to me as Motion Judge by virtue of Section 7 as read with its proviso(a) of the Supreme Court of Appeal Act. The applicants, through the affidavit they have filed in support and the exhibits it carries, indicate that they are currently serving various terms of concurrent imprisonment, the longest of which sentences are 5 years long. They were, along with several others, on 10th January, 2019 convicted by the High Court of Malawi sitting at Lilongwe for the offences of conspiracy to defraud, theft, and money laundering.

Disgruntled with both their convictions and sentences, the applicants readily appealed to this Court against the same. They soon thereafter applied to the High Court for a stay of execution of their sentences and for admission to bail pending appeal. The High Court delivered its ruling on that application on 24th July, 2020 and denied them bail. It is following that determination that, through this summons, the applicants want to try their luck afresh in this Court. They have basically entitled their summons as one on an *'..application for admission to bail pending the determination of appeal.'*

However, as a matter of fact this is, strictly speaking, not an application that is pending the determination of the appeal it relates to. There is no evidence to suggest or to show that a record of appeal has been prepared and/or filed in this Court by the Registrar of the Court below in terms of Order IV rule 8 of the Supreme Court of Appeal Rules, which means that the material appeal is not yet in a position to be heard and has therefore not been heard. It is, therefore, far from being pending a determination except in a very remote sense. It would thus have been more precise to describe this application as one for bail pending the hearing of the appeal. In any event, if it was supposed to come to this Court by virtue of Order I rule 18 of the Supreme court of Appeal Rules then it was not supposed to be other than a repeat of the application

that was presented in the High Court that was dismissed, not an adjusted version thereof.

I heard this application on 14th August, 2020. I did so soon after hearing, among other applications, the application in MSCA Criminal Appeal No. 3 of 2020, **Thomas Mzunga vs The Republic**. I have thus this past week been working on the rulings of all these matters side by side. Now, since I set the ruling in **Mzunga**'s case for Friday last i.e 21st August, 2020 and the one for this matter for today, Monday 24th August, 2020, of necessity I had to complete the **Mzunga** ruling first. My frequent reference to the **Mzunga** case might be somewhat puzzling, but this is because of the connection I will shortly make apparent between these two cases, and because of the impact the decision I pronounced in that matter will have in my determination of the present application.

As a reading of the **Mzunga** ruling will reveal, the preparation I went through in the course preparing the said ruling has brought about a profound transformation in me *vis-a-vis* the way I will from now henceforth be viewing applications for bail pending appeal. As a direct consequence of that, I have abandoned the conventional way in which we have so far in this Court understood the law and the procedure to be in these types of bail applications. It has virtually been our settled view up to this point in time that when a convict has filed a notice of appeal to our Court from a decision of the High Court in a criminal matter, if he next wishes to pursue an application for bail before his appeal gets to disposal stage, his application falls under the concurrent jurisdiction of both the High Court and this Court.

As such we have also held on to the view that the only thing that curtails the applicant's freedom of choosing which forum to take his application to is Order I rule 18 of the Supreme Court of Appeal rules, which we have said requires him to, at first instance, bring such application to the High Court. It is from there, we have consistently pointed out, that it can

graduate to this Court, but only in cases where bail has been refused. My new view, however, is that this interpretation of the law and procedure applicable to such applications is not correct on a sober reading of the relevant legal provisions on this subject.

What happened was that in an effort to prepare well for my determination of the **Mzunga** case, which I decided to attend to first, I instead of going through the routine exercise of debating the various *dicta* our Court has pronounced in multiple earlier cases, decided to journey back to the primary provisions that govern, or ought to govern, applications of this type in criminal matters that are in transit from the High Court to this Court. As acknowledged above, it is that effort that has yielded me the big lesson that in these applications we have so far been operating on a misinterpretation of existing law and procedure. Our long held view that there is concurrent jurisdiction between the High Court and our Court over such bail applications that are lodged after the filing of an appeal is not correct. In my view it cannot be defended on the law as couched in the material statutes. Accordingly, it was my holding in the **Mzunga** case that our application of Order I rule 18 of the Supreme Court of Appeal Rules to the floodgates of bail applications pending appeal that have virtually as a matter of course been making way into our Court week in week out for a second bite each time the High Court denied an applicant bail has been a big and unnecessary error. The way I now comprehend and view the law and the procedure in such matters, none of this drama should have happened, and it ought not to happen again.

Coming to the present application, it strikes me that its circumstances render it liable to follow in the footsteps of the **Mzunga** case determination on the correct way of interpreting legal provisions that apply to matters of bail sought post appealing to the Supreme Court of Appeal in criminal proceedings. As I move towards a determination of this application, I will accordingly apply the reasoning I used in the **Mzunga** case, and not go by the reasoning our Court, me included, has

been employing in earlier cases. I do realize, however, that I must upfront put my cards on the table. It will not take me by surprise if in this case, just as must have been the case in the **Mzunga** case, the parties will feel ambushed with my sudden transition from the conventional interpretation of the law and procedure I and my colleagues have been using in these matters to my new and different interpretation of the same. This is because I did not in both these applications have the means or the opportunity to solicit the parties' input into the thinking and the views I have now embraced. What I need to make clear is that it is not that I had planned to deliberately keep them out of the picture and deny them the chance to digest my views and comment on them. It is just that since I heard these applications in a roll, one after another in a single morning, and that my views only changed after I had concluded the hearings as I was beginning to prepare my rulings, there was no way, having by then I had become *functus officio* regarding the hearings, I could have reconvened the hearings just so that the parties could comment on my changed views.

This notwithstanding, it is my conviction that the change I have made in my perception of these matters is one concerning the law and its interpretation. As such, it is not negotiable. I thus cannot hold myself back from pronouncing my new legal views on this subject just because I did not benefit from being addressed by the parties on the same. Be this as it may, it is my apprehension that the law is the law whether a litigant or his Counsel comment on it or not. It is supposed to remain constant. As a judge I believe it is my duty to uphold the law in the best manner I understand it at any given point in time. Regrettable, therefore, as it may be that I did not, as would have been ideal, enriched myself with the prior views of learned Counsel for the parties on my new way forward, I must go ahead and decide the matter in line with how I now see the law, as opposed to how I viewed it last week or earlier.

As I will soon endeavor to demonstrate, contrary to the impression we have so far portrayed through our decisions in this area of applications, the law has not created one *omnibus* type of applications for bail pending appeal. In fact, it has created two distinct types of such applications. This is where we got it wrong as we took it as if all bail applications pending appeal fell into a single category. The first is one where a bail application can be made by an appellant in criminal proceedings *pending the hearing* of his appeal. This type of application falls under Section 359 of the Criminal Procedure and Evidence Code (Cap 3:01) of the Laws of Malawi (hereinafter referred to as the CP and EC). Jurisdiction over this species of bail applications, as the material provision makes quite manifest, lies in the High Court and in no other Court. In my understanding what this means, and ought to mean, is that no appellant should ever be allowed to bring an application for bail *pending* the *hearing* of an appeal to the Supreme Court of appeal.

What hereafter comes as the second type of bail application pending appeal is one where an application for bail can be made by an appellant in criminal proceedings when his appeal has been heard by the Supreme Court of Appeal, but it is then *pending determination* by the Court. This species of application for bail pending appeal falls under Section 24 of the Supreme Court of Appeal Act. It becomes plain as one reads this legal provision that this type of bail application can only be taken up in the Supreme Court of Appeal, and not in any other Court.

The first lesson I see imparted to me after this manner of viewing and analyzing the above two legal provisions is that the High Court has, under the CP and EC, been solely given jurisdiction over the type of bail application that can only be taken up between the time of a convict filing a notice of appeal to the Supreme Court of Appeal in a criminal matter and the time of the hearing of his appeal, but before it has been heard. The second lesson I get is that once the appeal has been heard, between that hearing and the determination of the appeal, if the appellant should

desire bail, according to law the jurisdiction to handle such application lies in the Supreme Court of Appeal , and that jurisdiction is not shared with any other Court. The two types of bail application that are respectively covered by Sections 359 of the CP and EC and 24(1) of the Supreme Court of Appeal Act, being clearly different the one from the other despite them belonging to the same genus of bail applications, i.e those that are only possible after an appeal has been lodged, and the jurisdiction over each of them having been given to a separate and distinct Court of law by different Statutes, I do not see any way of us continuing to view the arrangement in place as one that creates, or one that was meant to create, concurrent jurisdiction between the High Court and this Court over these separate and distinct assignments that the two Courts herein have each been separately and independently mandated to preside over. It is for this reason that I have taken the position that we went into a wrong direction when we either drew the conclusion that there was concurrent jurisdiction or when we agreed with existing precedents that advocated this concurrence of jurisdiction. The way I see it, we thus just need to retrace our steps and find our way back to the correct path.

Since I have said that my new views came into being after I had already heard this summons, its hearing proceeded in the usual manner these matters have traditionally been handled these past many years. The applicants went through the usual justifications for bringing up this application to this Court to show that the application qualifies for the attention of the Court. This necessarily depended on them showing that soon they appealed to this court, they initially applied for bail pending appeal to the High Court which dismissed the same. They then contended that since in bail applications pending appeal, as held and upheld by a rich set of precedents from this Court, they are entitled under Order I rule 18 of the Supreme Court of Appeal Rules to now bring this application to this Court due to the fact that this Court and the High Court have been held enjoy concurrent jurisdiction over such matters,

their right of audience in this Court is therefore guaranteed and beyond question. After creating this *locus standi* foundation, they then went to argue what virtually looked like the whole of their appeal in advance before me in a bid to convince me that their appeal has high prospects of success. It is then that they passionately argued that I should consider releasing them on bail in line with the prayer in their summons.

As the record will show, the respondent, i.e the State, was opposed to this application, and for this purpose it was duly armed with both an affidavit and skeleton arguments in opposition. For reasons of saving time, I will not go into summarizing the arguments the State presented by way of buttressing its opposition stand to this application. I will only say that they presented the usual arguments that the faith the applicants have in the high prospects of success of their pending appeal is peculiar to them and that the respondent does not share in it since it believes that the appeal in question is doomed to fail.

Reverting to the foundation the applicants anchored their application on, it can be seen that it does not fit in with the understanding I have above captured as currently dominating my mind on the provisions that govern the two species of applications for bail pending appeal that the law recognizes and distinguishes. Going by my conviction that jurisdiction over bail applications *pending determination* of an appeal rests in this Court, since the applicants have labled their application as one for *admission to bail pending determination of appeal* it may very well, on face value, appear as if they have brought this application to the correct forum. However, examining the application a little deeper, it turns out that the case record is still with the Registrar of the Court below, hopefully undergoing preparation of a record of appeal for subsequent filing in this Court. The reality on the ground, therefore, is that the application before me is in fact an application for bail *pending hearing* rather than, as represented by its heading, an application for bail *pending determination* of the appeal.

Going by the content of the law, therefore, without a doubt, in the circumstances that are prevailing as at now this is not an application that belongs to this Court. It is one that exclusively belongs to the High Court. Now, since an application for bail *pending hearing* of the appeal was already heard by the High Court and dismissed, a second bail application *pending hearing* even if it is entitled as an application for bail *pending determination,* would be clearly superfluous and irrelevant, both in this Court and in the High Court. It is accordingly my judgment that if the applicants were being serious when they described this application of theirs as one for bail *pending* the *determination* of the appeal, then it is very much pre-maturely before this Court. As the hearing of the said appeal has yet to happen, it needs to take place first before it can become true that the applicants have a ripe application that is in pursuit of bail *pending determination* of such already *heard* appeal. I am quite certain that this Court cannot be getting called upon to entertain premature applications, as doing so would be perverse. It is for this reason that I now dismiss the applicants' prayer for bail *pending determination* of their appeal herein. I so rule.

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