IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA Criminal Appeal No. 12 of 2017

(Being High Court of Malawi, Principal Registry, Criminal Sentence Rehearing Case No. 35 of 2016)

Between:

Charles Khoviwa.....Appellant/Applicant

And

The Republic.....Respondent

Coram: Honourable Justice A.C. Chipeta SC, JA
Chithope Mwale, Chief Legal Aid Advocate, of counsel for the Appellant/Applicant
Masanjala, Senior State Advocate, of Counsel for the Respondent
Minikwa/Masiyano, Court Clerks

RULING

The Application

On 27th October, 2020 I heard an application by Charles Khoviwa for bail pending the determination of his appeal. He has based the application on Section 24 of the Supreme Court of Appeal Act (Cap 3:01) of the Laws of Malawi and supported it with two affidavits and skeleton arguments.

The respondent, which is opposed to the proposed bail, has likewise evinced its stand through an affidavit and skeleton arguments. It strikes me, I must say, that the law this application is based on is expressed in simple and straightforward language. I thus do not see much room or reason for resorting to complicated interpretations in the determination I have to carry out.

Background

It all started with the applicant's arrest on an allegation of murder on or about 1st January in the year 2002. He was then around 16th September, 2003 tried and convicted of murder in the High Court sitting at Mulanje. By then the imposition of the death penalty for this offence was not considered to be discretionary, and he was thus sentenced to death virtually as a matter of course. Dissatisfied with all this, he appealed to the Supreme Court of Appeal against both the verdict of murder and the sentence of death, but the appeal was dismissed *in toto.* In the result, both his conviction and his death sentence, as far as courts are concerned, remained solid.

There then came on the scene the case of **Kafantayeni and Others vs Attorney General** [2007] MLR 104, which was decided on 27th April, 2007. It was a decision of the High Court sitting as a Constitutional Court. It held that it was unconstitutional in cases such as the applicant had undergone for Courts to impose the death penalty as a matter of mandatory obligation. Consequently, the Court ordered that Kafantayeni and his fellow convicts in that case be accorded a sentence rehearing so that they could be given what the Court in its discretion might consider to be appropriate punishments after such a rehearing exercise. After this there followed the case of **McLemonce Yasini vs The Republic** MSCA Criminal Appeal No. 25 of 2005, which was decided on 1st November, 2010. In it the Supreme Court of Appeal extended the amnesty of sentence rehearing that the High Court had given to Kafantayeni and his

co-accused to all other convicts that had been sentenced to death the time that penalty was considered to be mandatory.

The applicant's case was amongst cases the Director of Public Prosecutions in due course brought to the High Court for the carrying out of a sentence rehearing. That was on 12th December, 2016, but on 13th January, 2017 the High Court pronounced its decision refusing the applicant the opportunity of having a sentence rehearing. This was on the basis that the applicant had already taken his death sentence to the Supreme Court of Appeal, which had confirmed it. Post this confirmation of the sentence by the apex Court, the High Court felt that it had no jurisdiction to conduct a sentence rehearing. Once again, the applicant found himself aggrieved with the High Court's decision. He appealed against the same, and he argued the said appeal on 28th February, 2018. It is now 32 months plus down the line, and he is still waiting for a determination. He is thus yet to know whether or not this Court will allow him to have a sentence rehearing. As he so further waits for his fate, he has spotted Section 24 of the Supreme Court of Appeal Act, which offers opportunity to persons in his position of predicament to ask to be considered for bail as judgment remains pending, and presented this application under it.

The Law

The Section 24(1) of the Supreme Court of Appeal Act that is at the heart of this application is in the following words, and I quote: *"The Court may, if it deems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal."* As is the case here, the applicant squarely fits into the description of persons that are entitled to call this provision in aid. He has an appeal in this Court. The said appeal was at the very least heard 32 months ago. Its determination is pending to this day. It follows then that his application for bail herein is in tune

with the legal provision it has been aligned to. There is no doubt, therefore, that this application is legitimately before the Court. In the event, all that remains to be done in this matter is for me to decide on the arguments the parties have presented to me whether *I do or I do not deem it fit* to admit the applicant to the bail he seeks as he continues to await the determination of his appeal.

At the hearing of this application, multiple reasons were advanced, both for and against, my granting of the bail that has been prayed for. I find it unnecessary to regurgitate all of them here. I, however, will bear all of them in mind as I strive towards determining the sole question I have depicted as remaining for me to consider in this matter. As I so proceed, let me disclose that it is my view that it must have been known when Section 24 herein was being enacted that it was going to apply to persons that had been convicted as offenders and been given sentences that kept them in prison. It is these prisoners the provision was meant to offer a window of opportunity for bail where they found themselves waiting for judgment for tiresomely long after presenting and arguing their appeals in this Court.

I take it, therefore, to have also been known that use of the provision was not going to be limited to a select group of such prisoners. As I see it, this provision was couched in liberal enough language to cover all who happen to be in prison awaiting judgment in their already argued criminal appeals, regardless of whether they are there only for a term of years of imprisonment, or for a life sentence of imprisonment, or even if they are merely there in transit as they await the carrying out of the death penalty on them. Equally, I note that Section 24 herein does not qualify the type of judgment that must be pending for any one such prisoner to employ it. It thus should not matter whether the appeal judgment being awaited is one on the merits of the conviction, or one on the propriety of the sentence, or indeed one, such as is the case here, on the right to be heard in a sentence rehearing exercise. The provision

simply accommodates any prisoner that has a pending criminal judgment in this Court. The only demand it makes on such applicant is to convince the Court to *deem it fit* to have him released on bail.

Determination

In **Catherine Mthawanji and Others vs The Republic** MSCA Criminal Appeal No. 10 of 2011 and in **Jonathan Mekiseni and Others vs The Republic** MSCA Criminal Appeal No. 20 of 2016 the applicants were, like the applicant in this case is, appellants in this Court. They had respectively argued their appeals five years and 37 months before they applying for bail under Section 24 of the Supreme Court of Appeal Act. At the time, they too were still awaiting delivery of their judgments. Their sentences were those of imprisonment for a term of years, the longest of which was 30 years for the offence of murder. Their common fear was that in case their appeals became successful whenever their judgments got delivered, it might turn out that they will have been kept incarcerated for needlessly too long. To mitigate the *possibility* of that happening, they were all released on bail until such time as their fate in the appeal would be pronounced and known. It was, however, made plain to them that if their appeals became unsuccessful they would be booked back into prison to continue serving their sentences from where they had taken a break from serving them as *per* Section 24(2) of the Supreme Court of Appeal Act.

In the present matter, the applicant/appellant has been waiting for judgment for not less than 32 months since the time he argued his appeal. The way I see it, by the time he was resorting to the Section 24 application he has brought to Court he was exactly in the same shoes as the applicants in the **Catherine Mthawanji** and the **Jonathan Mekiseni** cases were wearing. Since, the way I comprehend Section 24, it does not matter that the applicants in those two cases were in prison under sentences of imprisonment for terms of years while the applicant is

under sentence of death, what this means is that their entitlement to use of this provision is not at all different.

Further than this, it being my construction of Section 24 that it does not distinguish and isolate what types of *pending* judgment will or and what types of *pending* judgment will not render it available to an applicant, it equally does not matter that applicants in the above-cited cases were looking forward to either an immediate setting aside or a reduction of their sentences on pronouncement of their pending judgments, while the applicant can only look forward to a reduction of his sentence after the additional procedure of sentence re-hearing *if* his appeal became successful. In my view, the fact that the hope for some relief in sentence was more immediate in the cited cases than it is in the case of the applicant does not change the fact that his hopes are basically the same as those the applicant in the **Mthawanji** case and the applicants in the **Mekiseni** case entertained.

Vis-à-vis the question whether, like was the case with the applicants in those two cases, I should also *deem it fit* to release the present applicant on bail, it is important that I seriously weigh the reasons he has advanced by way of buttressing his prayer before I can conclude my determination of the outcome to pronounce. Going, however, by the affidavit evidence he has presented, which evidence has not in any way been controverted by the respondent, it appears to me that the applicant stands more than a probable chance to get a discount on his death sentence to a mere term of years in this matter if only it should happen that in its pending judgment this Court allows him a sentence rehearing. I am this confident because, as he has endeavoured to show, most death sentence prisoners that have gone through this procedure have had their death penalties quashed and substituted with penalties of imprisonment for a term of years. Indeed, as the applicant has further laboured to demonstrate, even prisoners that were in his position i.e those with death sentences that had been confirmed on appeal but who, unlike him, had the luck to

access sentence rehearings, most of them have also had their death penalties quashed and replaced with imprisonment punishments for a term of years. In my judgment, therefore, prospects are high that if this Court's pending judgment happens to open doors for the applicant to undergo a sentence rehearing, he would most likely get a sentence below the level of death.

As the depositions in the affidavits in support have shown, this is the applicant's 18th year while living in prison since his arrest and subsequent conviction. Bearing this in mind, along with the fact that he has already waited for 32 months plus just to know whether or not he will have a sentence rehearing, I have asked myself whether I should deny him bail, even though Section 24 above-referred entitles him to apply for it, just because his sentence is one for death and not for a mere term of years of imprisonment, or just because even if his appeal succeeds it is not automatic and immediate that he will get a reduced sentence, or indeed just because the immediate delivery of his pending judgment by the full Court is what might be a more effective remedy. Suffice to say that in the end I do not think that it would be in the interests of justice to find lame excuses for denying the applicant bail when it is not his fault that the judgment he awaits has been pending for so long, and when by now he has already been in prison for so many years without even knowing whether and when, if at all, the death penalty will be meted out on him.

In the circumstances, I find myself quite satisfied that the applicant has given me sufficient reasons to enable me to *deem it fit* to release him on bail pending the determination of his appeal. I accordingly grant him bail on terms that I will shortly stipulate. I notice that in his deposition the applicant has already indicated that if granted bail his intended place of abode will be Tambala village, T.A. Chikumbu in Mulanje District. This is useful information and it will help in my setting of the reporting obligations he must comply with.

Now, before I spell out the conditions of this bail, I should like to put it on record that, as I had well informed the parties at the outset of the hearing of the application, judgment is ready in this matter and chances are that the full Court will deliver it sometime soon. When actually that delivery takes place will, however, depend on the administrative logistics that must be put in place to facilitate such delivery. Be this as it may, I have deliberately not wanted administrative considerations to cloud my interpretation and application of Section 24(1) of the Supreme Court of Appeal in the matter at hand. It is my belief that justice must at all times be treated as a priority, and that it ought therefore to override administrative considerations where the two are competing for attention. My grant of bail in this matter, therefore, is despite my knowledge that the Court now has the judgment the applicant has been waiting for, and that soon adequate arrangements will be made to have it delivered.

As I let Charles Khoviwa proceed on bail pending the determination of his appeal, I order that he observes the following conditions:

(a) He should before a designated Registrar of this Court 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 to be recovered from him for forfeiture purposes only if he breaches the bail bond

(b) He should next furnish to the said Registrar two sufficient sureties for examination *vis-à-vis* their fitness to undertake the responsibilities that attach to bail sureties. The said sureties, if found satisfactory, will each have to be also 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; which balances will only be recovered from them for forfeiture purposes in the event of the bail bond being breached.

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

(d) That he should be reporting in answer to his bail bond to Mulanje Police Station every Friday of the fourth week of the month during working hours before noon.

(e) That he should not travel outside Mulanje District without first informing the Officer-in-Charge of the said 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, Charles Khoviwa 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 if deposited with the Court; his sureties too will, in the event of the bail bond herein not being breached will also be entitled to claim a 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 5th day of November, 2020 at Blantyre

A.C. Chipeta SC, JA
JUSTICE OF APPEAL