



IN THE MALAWI SUPREME COURT OF APPEAL

CRIMINAL APPEAL NUMBER 2 OF 2022

BETWEEN

LUKA BWANALI-----APPELLANT

AND

THE REPUBLIC-----RESPONDENT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE JA

Maele, Counsel for the Appellant

Chisanga, Counsel for the Respondent

C. Fundani, Recording Officer

RULING

This is a notice of application for admission of the appellant to bail pending the hearing and determination of the appeal. The application is brought under section 24(1) and (2) of the Supreme Court of Appeal Act. In support of this application there is an affidavit filed by Festino Yankho Maele a legal practitioner of Maele Law Practice. In a nutshell, the affidavit is as follows:

1. The applicant is currently serving a sentence of 7 years imprisonment with hard labour (IHL) at Chichiri prison.
2. The applicant was charged with the offence of being found in possession of a specimen of a listed species namely a pangolin contrary to section 86(1) as read with section 110(b) of the National Parks and Wildlife Act.

3. After full trial, the applicant was found guilty and convicted. He was subsequently sentenced to 7 years IHL. His co-accused was however acquitted.

4. The applicant's file was subsequently sent to the High Court for confirmation and on 13th December 2021 Justice V. Chima confirmed both the conviction and sentence.

5. The applicant intends to appeal against the conviction and sentence on the ground that the state did not prove the essential element of the offence namely that the applicant had no license to possess a pangolin.

6. The applicant applied for leave to appeal which leave was duly granted. The applicant also applied for bail pending appeal. On 15th of August 2022, the High Court declined to consider the applicant for release on bail pending appeal on the ground that the applicant was convicted and sentenced and that both the conviction and sentence were confirmed by the High Court that it would be unlikely for the applicant to avail himself for trial.

7. The applicant therefore applies for bail pending appeal to this court on the grounds that there were conflicting positions on the issue of proving licenses on offences of possession without a license. Some Judges in the High Court hold that you have to strictly prove that the accused person had no license whilst other judges like in this case hold that there is no such requirement.

8. It would therefore not be fair and just that the applicant should continue serving a sentence when there are these two conflicting schools of thought.

In response to this application the respondent filed an affidavit opposing the application. The affidavit of Samuel Chisanga is as follows:

1. The respondent agrees with all the factual narrative of this matter.

2. The respondent however says that the applicant did not state whether his appeal will succeed or not it is a fifty-fifty situation. The respondent believes that the appeal by the applicant will not succeed on the ground that the High Court on confirmation did confirm both the conviction and sentence and that the applicant had an opportunity in his defence as a rebuttal to bring in evidence a license for possessing a pangolin.

3. That the respondent is again of the firm view that the appeal if filed with the court, will be heard before the applicant has fully served the sentence considering that 7 years jail sentence is a very long custodial sentence.

4. The respondent therefore submits that the applicant's prayer for bail pending appeal has no merit.

Both counsel briefly addressed me. Counsel for the applicant referred the court to the ruling by Justice R.M Chinangwa in particular paragraphs 13 and 14. This ruling was the one dealing with leave to appeal out of time in which the applicant was seeking such leave. Counsel also referred the court to the case of **Edwin McFare vs The Republic High Court (Principal Registry) Criminal Appeal Number 16 of 2014(Unreported)** in which Justice Chirwa had made a finding that the prosecution had the burden to prove beyond reasonable doubt that the accused had no license or permit.

Counsel for the respondent in his brief submission stressed the fact that the applicant's counsel does not confirm that the appeal will be successful. That the applicant wants the conflict to be settled by this court.

I have listened to both parties. This being an application for bail pending appeal, the applicant has to satisfy the court that there are exceptional circumstances warranting release of the applicant. Having attentively listened to the applicant's arguments, it is very clear that the basis for this application is the alleged conflicting decisions by two High Court Judges. I have to however navigate very carefully here. The applicant's arguments are very tempting for this court to decide the substantive appeal through the backdoor. This I will not attempt to do.

As was rightly noted by counsel for the respondent, the applicant did not elaborate how they thought the said conflicting decisions by the two judges will lead to the success of the appeal. I have meticulously gone through paragraphs 13 and 14 in the decision of Justice Ruth Chinangwa. For avoidance of doubt this is what she said:

"13. It is this courts view that crimes of alleged possession are strict liability offences as the law creating the crimes intend to address a mischief in society. For example, where one is found with a prohibited drug, the offence should be

considered proved to avoid the proliferation of drugs in societies. It should be for the accused to prove that a license was acquired for the same.

14. In this case, however, this case went through the lower court record page by page. This court found that during the presentation of the defence case the convict was asked in cross-examination whether he had a license or not and he responded that he did not have a license. It is this court's view that much as the specific question was not put to the applicant as to whether he had a license or not the totality of the prosecution evidence points to the fact that the applicant had no license. The circumstances in which he was found with and was selling the pangolin shows that he had no license as explained in the caution statement. Thus the appellant's appeal would not succeed on mere technicality and can be cured under section 3 and 5 of the Criminal procedure and evidence Code."

When I look at what Chirwa J had said in his judgment, on the burden and standard of proof in matters of this nature and relate it to what Chinangwa J had said here, I am of the view that no exceptional circumstance has been shown meriting the applicant to be admitted to bail pending appeal.

I therefore dismiss this application in its entirety.

Delivered this 26th day of October 2022 at Blantyre.

A handwritten signature in black ink, appearing to be 'M. C. C. Mkandawire', written in a cursive, flowing style.

JUSTICE M.C.C MKANDAWIRE JA