THE REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

SITTING IN BLANTYRE

MSCA CRIMINAL CASE NO. 9 OF 2021

(Being Criminal Case No.7 of 2020 Before Honourable Justice DeGabrielle)

BETWEEN:

DR. THOMSON MPINGANJIRA ..... APPELLANT

-and-

THE REPUBLIC .....RESPONDENT

CORAM: THE HON. MR JUSTICE FE KAPANDA SC, JA

Nampota and Maele, Counsel for the Appellant

Chiwala and Rapozo, Counsel for the Respondent

Ms Chimwemwe Masiyano, Court Clerk

Date of Hearing: 13 January 2022

Date of Ruling: 4 February 2022

ANNOTATIONS

Cases cited

Malawi

Brown Mpinganjira v Dumbo Lemani and Davis Kapito Civil Cause No. 222 of 2001(unreported)

Chikwewa v Republic [1995] 1 MLR

Cornelius Kaphamtengo and Others v Republic MSCA Criminal Appeal No. 1 of 2020 (unreported)

G.L. Chirwa v Attorney General [2006] MLR 175 (HC)

Jose Manuel and others v. Republic Criminal Appeal No. 17 of 2017 (unreported)

Jose Manuel and others v Republic Criminal Appeal No. 17 of 2017 (unreported)

Joseph Kapinga and another v R MSCA Crim Appeal No. 16 of 2017 (unreported)

Kusowa v Republic MSCA Criminal Appeal No 9 of 2015 (unreported)

Macdonald Kumwembe and others v Republic MiscellaneousCriminal Appeal Nos. 5A and 5B of 2017 (unreported)

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Peter Katasya v R MSCA Crim Appeal No 11 of 2020 (unreported)

Reserve Bank of Malalwi vs Finance Bank of Malawi Limited Constitutional Cause No 5 of 2010 (unreported)

Saukila v National Insurance Company [1999] MLR 362 (SCA)

Suleman v R [2004] MLR 398 (SCA)

Sumaili v Republic [1961-1963] 2 ALR Mal 552*Jailosi v Republic* (1966-68) ALR (Mal) 494

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Mutharika and Electoral Commission v Chilima and Chakwera, MSCA Constitutional Appeal No.1 of 2020

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England

Director of Public Prosecution v Kilbourne [1973] AC 729

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R v Taylor (1928) 21 Cr. App. R 20

Nothman v Barnet Council (1978) 1 All ER 1243

India

Santhini v Vijaya Venketesh [2018] 1 SCC 56

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F.C.D.A v Ezinkwo [2007] ALL FWLR (Pt 393) 95

F.R.N v Fani Kayode 2010 14 NWLR (pt 1214) 481

Canada

Carleton Condominium Corporation No 476 v Wong, 2020 ONCA 244

Statutes and Rules

The Constitution of the Republic of Malawi

Courts Act

Corrupt Practices Act

Supreme Court of Appeal Act

Supreme Court of Appeal Rules

The Supreme Court of Appeal Practice Direction Number 1 of 2018

RULING

Kapanda SC, JA:

INTRODUCTION

Before me is an application on notice dated 23 December, 2021 brought under Section 24 (1) and (2) of the Supreme Court Act, Chapter 3:01, of the Laws of Malawi. The applicant seeks to be released on bail pending the hearing and determination of an appeal.

The grounds upon which the application is premised are in its body and the supporting affidavits of Fostino Yankho Maele as well as that of Dr. Patrick Kamalo. the application is also supported by the applicant's skeleton arguments.

The application was canvassed by way of oral submissions. The appellant is calling upon this Court to look at four (4) exceptional and unusual circumstances that he contends entitles him, in the interest of justice, to an order for bail pending the hearing and determination of an appeal. The said exceptional and unusual circumstances are put by the Appellant as follows:

1. Possibility that the appeal will succeed. This will also involve a demonstration that the accused was subjected to unjustifiable interferences and intimidation by the presiding Judge during trial occasioning a mistrial in the process.
2. Delays in the processing of the appeal as a result of the court being unable to achieve a quorum in the short and long term.
3. Poor health of the appellant.
4. The fact that the Applicant has all along the trial been compliant of the bail conditions and is a citizen of substantial standing in the Society

The Applicant applies for stay of sentence and admission to bail pending hearing and determination of appeal. The Respondents oppose the application.

FACTUAL BACKGROUND

The salient facts in this matter, as noted from the affidavits and the record of the court below, are as follows:

The Appellant herein appeared before the High Court sitting in Blantyre charged with six counts under the Corrupt Practices Act. In count one, the Appellant was charged with Offering an advantage to a public officer, contrary to section 24 (2) of the Corrupt Practice Act. The particulars of the charge averred that Thomson Mpinganjira, between 1st October, 2019, and 30th November, 2019, within the City of Blantyre, offered an advantage, namely, an unspecified amount of money, to Justice Atanazio Tembo, for the benefit of the said Justice Michael Atanazio Tembo and Justice Healey Potani, Ivy Kamanga, Dingiswayo Madise and Prof. Redson Kapindu, all public officers and members of the Constitutional Reference Case Number 1 of 2019, as an inducement for the five judges to decide the Constitutional Reference Case Number 1 of 2019, in favour of the respondents in the said Constitutional Reference Case. Further, and in the alternative, the Appellant was charged with Attempting to induce a public officer to perform functions corruptly, contrary to section 25A (2) of the Corrupt Practice Act. The particulars of the charge averred that Thomson Mpinganjira, between 1st October, 2019, and 30th November, 2019, within the City of Blantyre, attempted to induce Justice Michael Atanazio Tembo, a public officer and member of the Constitutional Court panel sitting on the Constitutional Reference Case Number 1 of 2019, to exercise or perform his functions corruptly, in relation to the said Constitutional Reference Case, namely to accept an unspecified amount of money for himself and for Justice Healey Potani, Ivy Kamanga, Dingiswayo Madise and Prof. Redson Kapindu, in order for the five judges to decide the said Constitutional Reference Case in favour of the Respondents namely Malawi Electoral Commission and President Arthur Peter Mutharika in the said Constitutional Reference Case.

In count three, the Appellant was charged with Attempting to induce a public officer to abuse his public office, contrary to section 25B (2) of the Corrupt Practice Act. The particulars of the charge averred that Thomson Mpinganjira, between 1st October, 2019, and 30th November, 2019, within the City of Blantyre, attempted to induce Justice Michael Atanazio Tembo, a public officer and member of the Constitutional Court panel sitting on the Constitutional Reference Case Number 1 of 2019, to abuse his public office or position as a member of the said Constitutional Court Panel, by offering him an unspecified amount of money, the advantage of the respondent Constitutional Reference Case.

In the fourth count, the Appellant was charged with Offering an advantage to a public officer, contrary to section 24 (2) of the Corrupt Practice Act. The particulars of the charge averred that Thomson Mpinganjira, between 1st October, 2019, and 30th November, 2019, within the City of Lilongwe, offered an advantage, namely, an unspecified amount of money, to Justice Healey Potani, for the benefit of the said Justice Healey Potani and Justice Michael Tembo, Ivy Kamanga, Dingiswayo Madise and Prof. Redson Kapindu, all public officers and members of the Constitutional Court Panel sitting on the Constitutional Reference Case1 of 2019, as an inducement for the five judges to decide the Constitutional Reference Case Number 1 of 2019, in favour of the Respondents in the said Constitutional Reference Case. Further, and in the alternative, the Appellant was charged with Attempting to induce a public officer to perform functions corruptly, contrary to section 25A (2) of the Corrupt Practice Act. The particulars of the charge averred that Thomson Mpinganjira, between 1st October, 2019, and 30th November, 2019, within the City of Lilongwe, attempted to induce Justice Healey Potani, a public officer and member of the Constitutional Court panel sitting on the Constitutional Reference Case Number 1 of 2019, to exercise or perform his functions corruptly, in relation to the said Constitutional Reference Case, namely to accept an unspecified amount of money for himself and for Justice Michael Atananzio Tembo, Ivy Kamanga, Dingiswayo Madise and Prof. Redson Kapindu, in order for the five judges to decide the said Constitutional Reference Case in favour of the Respondents in the said Constitutional Reference Case. Lastly, in the sixth count the Appellant was charged with Attempting to induce a public officer to abuse his public office, contrary to section 25B (2) of the Corrupt Practice Act. The particulars of the charge averred that Thomson Mpinganjira, between 1st October, 2019, and 30th November, 2019, within the City of Lilongwe, attempted to induce

Justice Michael Atananzio Tembo, a public officer and member of the Constitutional Court panel sitting on the Constitutional Reference Case Number 1 of 2019, to abuse his public office or position as a member of the said Constitutional Court Panel, by offering him an unspecified amount of money, the advantage of the respondent Constitutional Reference Case.

On 10 September, 2021, after a full trial, the court below delivered its judgement on the matter and the Applicant was found guilty of counts 2, namely, attempting to induce a public officer to perform functions corruptly, contrary to section 25A (2) of the Corrupt Practice Act and count 4 of Offering an advantage to a public officer, contrary to section 24 (2) of the Corrupt Practice Act. On 5 October 2021, following the conviction, the Court sentenced the Appellant to 9 years imprisonment with hard labour on both counts. The sentences were ordered to run concurrently. On being dissatisfied with the conduct of the trial, the conviction and the sentence imposed by the Court below, the Appellant filed a Notice of Appeal against the conviction and the sentence. The Notice of Appeal has since been served on the Respondent.

It is averred by the Appellant that he desires to be granted bail pending the hearing and determination of the appeal on the grounds that: First, the appeal herein cannot be heard anytime soon as, pursuant to Practice Direction No. 1 of 2018 dated 6 February 2021, there is currently no quorum in the Supreme Court of Appeal to hear and determine the Appellant's Appeal as some of the Justices of Appeal in the Supreme Court are conflicted and cannot hear this appeal. Secondly, it is asserted by the Appellant that the appeal has prospects of succeeding and that there was miscarriage of justice at the trial in the court below. The Appellant then sets out the particulars of the miscarriage of justice as well as the grounds to support the assertion that the appeal has prospects of success. These are, inter alia, namely that there was no proof of the essential elements of the offences in counts 2 and 4; that conclusions drawn by the trial court were not supported by the evidence; that the Court below convicted the Appellant on circumstantial evidence while there are several very weak links and leaps in reasoning that make the Appellant's conviction unsafe; that the Court below reached the conclusion that the Appellant offered inducement to Justices Tembo and Potani even when Justice Potani said in his testimony that he never met the Appellant , he never received a parcel from the Appellant, and he never discussed money or

parcel with the Appellant. It is said that the Court ignored the unassailable and consistent version of the facts that all the Appellant possibly did – if at all – was to inquire with both Justices Tembo and Justice Potani about what he had heard that the judges were receiving money from all or any political parties involved in the elections case. The Court ignored this exculpatory version and dismissed the same without a solid basis. The Appellant continues to assert that there is no evidence on record that the Appellant intended any political party let alone the Democratic Progressive Party to win the elections case and that this is bolstered by evidence that he was in touch with many if not relevant political parties and/or their leaders and made donations to them for purposes of the 2019 elections. It is further averred that there was no conclusive evidence to support the Appellant's conviction. The standard of proof beyond reasonable doubt was not met as the evidence upon which the Appellant's conviction was based was largely hearsay, circumstantial not leading to one and one only plausible conclusion and was insufficient to warrant a conviction.

Regarding the issue of a mistrial, inter alia, it is deponed by the Appellant that the conduct of the court below to partially hear the matter virtually infringed his right to a Public trial in accordance with the applicable Criminal law. It is further put by the Appellant that the conduct of the court below by wrongfully and unreasonably interjecting while the accused's Legal Practitioners were cross-examining state witnesses was unconstitutional, unlawful and therefore void for infringing on the Accused's right to a fair trial before an independent and impartial court. The Court would wish to add that the Appellant put before it audio recordings of the trial to buttress this assertion. Further, the Appellant states that the conduct of the court below by unreasonably purporting to revoke bail, which bail had not fallen away, without any or any proper reason and repeatedly warning the Claimant that he would be sent to prison if the court thought that he was trying to delay trial and thus intimidating the Claimant was unconstitutional, unlawful and therefore void. Finally, the Appellant put it in evidence that the alleged conduct of the of the Judge President of the High Court of Malawi in allegedly attempting to solicit a bribe from the Appellant allegedly for the purpose of securing a verdict of an acquittal in the court below infringed the Appellant's right to a fair trial before an independent and impartial court of law is unconstitutional and void.

The Appellant's health concerns and age have also arisen in the application before this Court. It is averred by the Appellant that he has a medical condition that at his age make for unusual, special or exceptional circumstances that militate for stay of sentence and his admission to bail pending hearing of the appeal. It is further averred that the Appellant is a patient who has been diagnosed with: Labile hypertension – unstable even on treatment; post Covid syndrome; Migraine headache; anxiety and depression; severe neuropathic pain.

Finally, it is common cause that the Appellant applied to the Court below for bail pending hearing and determination of appeal. On 22 December, 2021, the application was declined. Hence, this application to this Court

In opposition, inter alia, the Respondents aver as follows: First, that the evidence tendered before the Court, including the actual telephone conversations and WhatsApp conversations, between the Applicant, Justice Michael Tembo and Justice of Appeal Healey Potani, are so overwhelming that any Court could convict the Applicant. Secondly, on the issue of a mistrial following what the applicant calls a virtual hearing as opposed to a public hearing, the Respondent avers that all the proceedings were conducted at the High Court Principal Registry in open Court save for one occasion where the session was held in camera on the Application by the Applicant. It is the further assertion of the Respondent that virtual session was also conducted in open Court with all parties physically present including the public and the media save for the judge who at the time was in Lilongwe and presided over the session virtually. The question that arises is whether or not virtual hearing or trial is allowed in Malawi. At first glance one would say that it is not provided for under the Criminal Procedure and Evidence Code. However, subject to what the Court will determine on appeal, the following is the position that this Court thinks should obtain.

Reforms of courts and judicial processes generally occur at a glacial pace. Not only is law inherently conservative, courts are complex systems. Thus, the implications of change is always reluctantly and carefully considered in order to ensure that relevant protections are maintained and cherished objectives

promoted.[1] Recently, the Supreme Court of Appeal in ***Mutharika and Electoral Commission v Chilima and Chakwera***[2], whilst granting the applicants for live audio broadcast and denying them for visual live broadcast, had this to say:

> "In our determination of the applications which relate to the applicants, we grant leave for live audio broadcast only. We do no grant leave for live television/visual broadcast. This is in order to preserve the decorum of the Court. Leave is granted on the condition that, except with the prior approval of the Court, the applicants shall ensure that there shall be no censorship and no editing of the proceedings in Court. Furthermore, the Court reserves the right to revoke the leave granted where the interests of justice so require." (Emphasis supplied)

However, it is no secret that many judicial systems across the globe are stumbling beneath a heavy burden of thousands of suits filed every year in court. The Malawi judicial system is not an exception. As if the burden of thousands of suits filed every year is not enough the coronavirus pandemic of 2020 has affected every aspect of our lives. The World Health Organization declared a pandemic on 11 March 2020.[3] The seriousness of the situation is explained by the observations of former Chief Justice of the High Court of Australia Sir Gerard Brennan:

> "[Courts] are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or to decline to hear the cases that they are bound to entertain, the rule of law would be immediately imperiled. This would not be merely a problem of increasing the backlog; it would be a problem of failing to provide the dispute-resolving mechanism that is the precondition of the rule of law[4].

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[1] J. McIntyre, A. Olijnyk & K. Pender, **Civil courts and COVID-19: Challenges and opportunities in Australia**, Alternative Law Journal 2020, Vol. 45(3) 195–201 p. 195

[2] MSCA Constitutional Appeal No.1 of 2020

[3] World Health Organization, WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 (11 March 2020).

[4] Sir Gerard Brennan, '*The State of the Judicature*' (1998) 72(1) Australian Law Journal 33, 35.

Necessity is forcing changes, particularly in the use of remote and online hearings that were impossible to imagine just before the 2019 elections. It therefore seems inevitable that interaction with the courts will soon be predominantly by digital means. Whether this increases access to justice will depend on how the IT is commissioned and whether sufficient resources are committed to its ongoing maintenance. At the same time, the pace of change in life is quite rapid - access to information and the need for efficiency have motivated many institutions, in the private and the public sector to transfer at least some of their activities and services to websites they manage. These activities have contributed both to social and economic connections, primarily saving time and money; existing backlogs have been reduced, processes have been streamlined, and wait times have been minimized. The Internet provides many and sundry services. The inherent advantage in moving certain activities online has not escaped the attention of the courts. It is no secret that justice systems in many countries are overburdened by a backlog of thousands of suits filed annually.

Further, **Justice D.Y Chandrachud** of the Indian Supreme Court in the case of ***Santhini v Vijaya Venketesh*** [5] instructively observed as follows:

> "There is no reason for court which sets precedent for the nation to exclude the application of technology to facilitate the judicial process. Imposing an unwavering requirement of personal and physical presence (and exclusion of facilitative technological tools such as videoconferencing) will result in a denial of justice."

As the pandemic has progressed, and jurisdictions have been forced to prolong or periodically reinstate lockdown measures, remote hearings have become commonplace. Courts have moved on from referring hearings as a necessary inconvenience, to affirming remote hearings, even whole trials conducted remotely, can be as fair and as open as to their face to face equivalents. Remote Court procedures are of course not new but they have traditionally been an exception to the default position of face to face proceedings. In some instances, as has been in the matter before this Court, the constitutional and statutory legitimacy of remote court hearings have been questioned.

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[5] [2018] 1 SCC 560

This Court accepts that virtual hearing is neither found in the Constitution nor in any statute. The term virtual hearing can only be found in the Practice Direction No. 1 of 2021 but it currently only applicable to the Supreme Court of Appeal. In the said Practice Direction, the term 'virtual hearing' was defined as "any hearing by means of teleconferencing, video conferencing or any other means of electronic communication. The term virtual hearing has also been defined elsewhere as "a court hearing or proceedings conducted by video or audio-visual devices."[6] On the other hand, 'Public hearing' was not defined by the Constitution but has been described as a hearing that is open to anybody who wishes to access or observe it.[7] It is important to note that what makes a hearing public is the accessibility of the members of the public to the court proceedings.

What does hearing in public entail? No reference to a room building or place is designated as court in the Constitution. However, the word public, used in an adjectival sense according to the **Cambridge Dictionary online** is defibned as "Relating to or involving people in general, rather than being limited to a particular group of people". In ***Kosebinu & ors v Alimi*** [8] Muhammad JCA opined thus:

> "A place qualifies under S. 36 (3) of the 1999 constitution to be called "public" … if it is out rightly accessible and not so accessible on the basis of the "permission" or "consent" of the judge."

In this country, in the case of ***Gwede v Attorney-General***[9], the Supreme Court held that an "appellant had been properly tried in a public trial where he was able to cross-examine witness and call his own witness."

As this Court understand it, regarding the public hearing provisions, the question arises in the instant case is whether or not the requirement that proceeding should be held in public can be understood to include virtual hearing. This Court has struggled to find a court decision or legislation on this point but

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[6] https://www.supremecourt.vic.gov.au/law-and-practice/virtual-hearings/virtual-hearings-glossary

[7] B.A Garner Black's, *Law Dictionary*, ed, (8th ed. St Pauls Minning: West Group, 2004) p. 2111.

[8] [2005]LPELR-11442 (CA)

[9] [2002–2003] MLR 59 (SCA)

the recent developments as captured in Practice Direction No. 1 of 2021 seems to suggest that section 42 (2) (f) (i) of the Constitution and Section 60 of the Courts Act could be understood to include virtual hearing. Nevertheless, it is the view of this Court that what satisfies the constitutional requirement of court proceedings held in public is accessibility of the public to the court proceedings. Thus, if the public has access to hearings virtually then it should be understood to have satisfied the requirement of 'proceedings held in public' stipulated by the Constitution. Therefore, such proceedings are not unconstitutional. Now, lets us see the constitutionality of the use of technology in court proceedings.

First, it is vital that we understand what a Constitution is and what it should ordinarily contain. In this regard, this Court found the decision in the case of ***F.C.D.A v Ezinkwo***[10] instructive where it was held that:

> "The constitution being the organic law of the country and the *fons et origo* from which all other laws derive their validity…no part of it can be described to be adjectival or procedural law…The Constitution is a substantive law."[11]

It is well to note that Constitutions of Kenya, Canada, India and the United States do not provide for remote or virtual proceedings however court proceedings are being conducted virtually or remotely in those countries on a daily basis. It may be concluded then that Malawi should not be any different. As this Court understands it, from the standpoint that the Constitution cannot deal with matters of procedure, the next question to then ask is whether or not there is any provision of the Constitution that prohibits virtual hearing? The Court is of the view that no provision exists in the Constitution prohibiting virtual or remote hearing. In saying this the Court, the has in mind the Constitutional and statutory requirement of hearing in public. Let us look at the provisions respecting public hearings. Section 42 (2) (f) (i) of the Constitution provides:

> "(2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right—

[10] [2007] ALL FWLR (Pt 393) 95

[11] Ibid. 115 paragraphs C-D

(f) as an accused person, to a fair trial, which shall include the right—

(i) to public trial before an independent and impartial court of law within a reasonable time after having been charged; (Emphasis supplied)

Section 60 of the Courts Act states:

"In exercise of its jurisdiction, powers and authorities the proceedings of every court shall, except as otherwise provided by any other law for the time being in force, be carried on in an open court to which the public generally may have access:

Provided that any court shall have power to hear any matter or proceeding or any part thereof in camera if, in the opinion of the presiding Judge, or magistrate, it is expedient in the interest of justice or propriety or for other sufficient reason so to do."

Finally, section 71 (1) of the Criminal Procedure and Evidence Code provides:

"(1) All proceedings under this Code shall, except as otherwise expressly provided by any law for the time being in force, be carried on in an open court to which the public generally may have access:

Provided that—

(a) any court shall have power to hear any inquiry or trial or any part thereof, in closed court and to exclude any particular person from the court, if, in the opinion of the presiding judge or magistrate, it is expedient in the interests of justice or propriety or for other sufficient reason so to do;

(b) nothing in this section shall apply to—

(i) the proceedings of a juvenile court in accordance with the Children and Young Persons Act; Cap. 26:03

(ii) any proceedings in the High Court relating solely to a person under the apparent age of eighteen years;

(iii) any proceedings in the High Court, other than the trial of a person of the apparent age of eighteen years or upwards, which the High Court, in its discretion, may think fit to conduct in closed court;

(iv) proceedings before a magistrate under section 83 (2), (3) and (4) or under section 84;

(v) the deliberation of a jury in the course of any proceedings;

(vi) any proceedings, other than an inquiry or trial, which the Chief Justice may, by writing, direct shall not be subject to this section."

It is the view of this Court that, the likely parts of the foregoing provision which a higher court will interpret to inquire whether virtual hearing is constitutional or not are subsections (2) (f) (i) of section 42 of the Constitution set out above. The sections partly states that the proceedings of a court shall be held in public. Neither the Constitution nor the General Interpretation Act explain the term 'public'. But the proceedings of a court being held in public can be explained to mean that members of the public can physically access the proceedings of the court. Put in another way, the court proceedings are not held in private. In virtual hearing, the public access to proceedings is usually through electronic means either zoom or video conferencing.[12] This should be seen as satisfying the constitutional requirement of public access to the court proceedings or proceedings held in public.

Alternatively, the approach that could be used to interpret these parts are those recommended by **Lord Denning M.R** in the case of ***Nothman v Barnet Council*** [13], cited with approval and as applied by the Supreme Court of Appeal in ***Sokalankhwazi v Sucoma*** [14] where he commended the purposive approach of interpreting statutes to all jurist as follows:

"It is no longer necessary for the judges to wring their hands and say: "there is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust

[12] See Practice Direction No. 1 of 2021

[13] (1978) 1 All ER 1243

[14] [2008] MLR 348 (SCA)

situation, the judges can and should use their good sense to remedy it by reading words in, if necessary so as to do what parliament would have done, had they had the situation in mind".

Further, in the Supreme Court of India in ***Meters and Instruments v Kanchan Mehta***[15], the Court instructively stated that:

> "The use of modern technology needs to be considered not only for paperless courts but also to reduce overcrowding of courts. There is need to categorize cases which can be concluded "online" without physical presence of the parties where seriously disputed questions are not required to be adjudicated like traffic challans."

Furthermore, more recently in the Canadian case of ***Carleton Condominium Corporation No 476 v Newton Wong***, [16] one of the parties requested for an adjournment to allow for an in court oral hearing, the Court of Appeal for Ontario in refusing the request and giving directive for virtual proceedings held as follows:

> "He expressed a preference for taking the panel through the arguments during an in court oral hearing at a future date. That preference is understandable, but it is not in the interests of justice. Moreover, it is not in the interests of justice to overburden the court by adjourning matters that can be dealt with fairly, as scheduled. The backlog that will be created by cases that must be adjourned to protect the public and ensure fair hearings will be imposing and it should not be unnecessarily aggravated."

Finally, in Nigeria, another common law jurisdiction in ***F.R.N v Fani Kayode*** [17] their Law Lords opined that:

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[15] Criminal Appeal No 1731 of 2017

[16] 2020 ONCA 244

[17] 2010 14 NWLR (pt 1214) 481

> "While judges must refrain from attempting to make laws from the bench, they must not shy away from adopting a proactive approach to the interpretation of the law. Judicial officers must not place on themselves, disabilities not imposed by law."[18] (Emphasis supplied)

As it were, the basic canon of interpretation or construction of statutory provisions remains that what is not expressly prohibited by a statute is impliedly permitted. It is therefore not within the court's interpretative jurisdiction or powers to construe a statute to mean what it does not mean, nor to construe it not to mean what it means. It is required of the Courts in Malawi to adopt a purposive interpretation of the Constitution that will take into account the current realities and the fact that by the tenor of the provisions of section 42 of the Constitution as well as section 60 of the Courts Act, public has not been restricted to the courtroom neither has virtual proceedings been prohibited.

In conclusion, there is something also instructive from the Supreme Court of Canada. In the case of ***Owners, Strata Plan LMS 3905 v Crystal Square Parking Corporation*** during its first virtual hearing the Supreme Court of Canada stated thus

> "We are adapting, but nothing is perfect the first time. Just remember that we are here for your arguments, not the angle of your camera or your facility with the mute button. We will get through this hearing, just as we will get through this pandemic."

Further, in Fiji, **Justice Madam Loukor**[19] opined that:

> "Harnessing technology for the benefit of litigants - seekers of justice - is of utmost importance and this is eminently achievable through visionary leadership."

Subject what the Court will find on appeal, this Court observes that, whilst the preference is for physical attendance in court for the conduct of trials especially where the assessment of witness demeanour is likely to be of relevance, there is no law that precludes the Courts in Malawi from allowing virtual hearings or proceedings.

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[18] Ibid. 503 paragraphs F-G

[19] A Retired Justice of the Supreme Court of India and currently a Justice of the Supreme Court of Fiji

On the issue of a mistrial on the grounds that the court below was wrongfully and unreasonably interjecting while the Applicant's Counsel was cross examining the Respondents witnesses, it is averred by the Respondent that the Applicant has not shown or given instances where the Court interjected his Legal Practitioners while cross examining the State witnesses. It is further averred by the Respondent that if there were any interjections by the Court it was when the Court sustained objections by the State. On the issue of bail revocation during trial, the Respondent states that the Court has discretion to grant or revoke bail if the interest of justice so requires. Thus, in the present case, the Court weighed the conduct of the Applicant and the interest of justice and ultimately exercised its discretion in revoking the bail. Respecting the issue of a mistrial on the grounds that the judge president of the High Court of Malawi allegedly solicited a bribe from the Applicant, the Respondent state that this issue was before the trial court where the Applicant failed to substantiate his claims.

On the issue of the Applicants health concern and age, the Respondent states that Exhibit TFM 7 shows that the Applicant had severe headaches but on examination, there was nothing remarkable. Further, that Exhibit TFM 8 is also clear that the Applicant's headache subsided and had no major incidence since admission. Further, that the Applicant has not indicated whether the symptoms have re-occurred, and no report has been attached to that effect.

ISSUES FOR DETERMINATION

What are the issues that arise and fall to be decided in the application under consideration by this Court? As this Court understands it, the main and only question raised by the application by the Appellant is viz.: whether or not this Court should grant the Applicant bail pending the hearing and determination of the appeal. Put differently, whether or not this is a matter in which it can be said that the it is in the interest of justice that the Appellant should granted the bail pending the hearing and determination of appeal.

THE PARTIES' ARGUMENTS

It is now necessary that this Court should look at the arguments that have been raised by the parties in response to this question. We shall start with the Appellants' arguments then move on to deliberate those put forward by the Respondents.

The Appellant

The Appellant directed the attention of this Court to the provisions of section 24 of the Supreme Court of Appeal Act and submitted that the court has discretion to admit an appellant to bail pending the hearing and determination of his appeal if the court deems fit to do so. He adds that the discretion is not limited nor are the circumstances limited but that the only limitation comes by the operation of the common law. It was further submitted that the position at law is that the courts have developed the principles that the discretionary power should only be exercised where there are unusual or exceptional circumstances. He added that the two conditions are some of the many exceptional circumstances the court can look at and that the list of what amounts to exceptional circumstances is not exhaustive or closed as it is open to the court to develop others.

It was further submitted by the Appellant that in determining an application for bail pending the hearing and determination of appeal, the courts are determining a measure that will serve the interest of justice and interests of justice is what must be looked at in determining all these unusual or exceptional circumstances. Thus, the correct focus for the court is that justice must be achieved, and injustice avoided when the court finally determines the appeal. The Appellant contends that there are three unusual or exceptional circumstances he has demonstrated in this application that would call for his being released on bail pending the determination and hearing of the appeal. These are: first, that there is a likelihood that the appeal will succeed. In this regard, the Appellant argued and submitted that without the evidence of Justice Tembo's recordings, the prosecution's case would crumble as the remaining evidence would be that of Justice Potani and a conviction on such evidence would clearly be a non-starter. The Appellant observed that in his conversation with one of the witnesses he simply referred to a parcel and Justice Potani stated that the accused never mentioned to him any amount of money in the parcel. He added in argument that Justice Potani stated that the parcel could have contained face masks or bottles of water. The Appellant continued to argue that an examination of the

circumstances in this matter did not draw one to the conclusion that the only inference to be drawn from them was that the accused person corruptly offered an advantage to Justice Tembo, Justice Potani and the others as an inducement that they decide Constitution Reference Case Number 1 of 2019 in favour of the respondents. It was the further submission of the Appellant that the evidence as captured by the court did not work cumulatively in geometrical progression, eliminating other possibilities, that the accused was guilty. He added that the evidence in the High Court is not leading to one reference only but to several inferences. Thus, the Appellant further added, it was therefore not open to the court to convict. Thus, bail pending appeal should be granted.

As further demonstration that there is a likelihood that the appeal will succeed, the Appellant argued that there were lots of interjections and intimidation of the accused and his counsel by the court below during trial so much so that there was no fair trial accorded to the Appellant. Thus, the Appellant's right to a fair trial provided for in the section 42(f)(iv) of the Constitution was breached. As a consequence, in the Appellant's view, there might be an order of a retrial on appeal. The Appellant continued to submit and argue that in the event of an order for a retrial the trial by the court below, which he believes is more likely, then the interest of justice would require that the applicant be released on bail pending the hearing and determination of appeal.

Secondly, the Appellant observed that, in terms of the Supreme Court Practice Direction Number 1 of 2018, for the appeal herein to be heard it will require at least 7 Justices of Appeal members to form a quorum. It was the contention of the Appellant that since the Supreme Court is unlikely to be Quorate anytime soon following the likelihood that the Judges who were comprised in the constitutional case, the subject of this case, will recuse themselves from handling this case, the appeal herein may not take place anytime soon. Thus, the delays in the appeal processes amounts to sufficient unusual or exceptional circumstances warranting granting bail.

Thirdly, the Appellant contended that he is experiencing poor health in prison. He then argued and submitted that the evidence of his poor health of proffered through the reports of Dr. Patrick Kamalo constitute a special circumstance and the interest of justice falls in favour of granting bail pending the hearing and determination of the appeal. It was further argued that the interests of justice would require

that the Appellant be released on bail so that he is able to attend to his medical conditions with a view that in the event of the appeal not succeeding he is able to resume his sentence.

In response to the Respondent's contention that an application for bail in the Supreme Court of Appeal can only be made after the appeal has been heard and not before, the Appellant argued and submitted that the contention by the Respondent is incorrect and out of sync with all the decided authorities this Court and the High Court have rendered.

The Respondent

Counsel for the Respondent started by arguing and submitting about his understanding of Section 24 of the Supreme Court of Appeal Act. He argued and submitted that Section 24(1) of the Supreme Court of Appeal Act is very clear that bail pending the determination of an appeal may be granted at the discretion of the Court. But continued to contend that this provision deals with matters where an appeal has already been heard by the Supreme Court and is awaiting determination and not before the said hearing of the appeal. He referred to the case of ***Cornelius Kaphamtengo and Others v Republic***[20] to support this argument. As shall be seen later in this ruling, the Respondent's understanding of the Section 24(1) of the Supreme Court of Appeal Act is not in sync with the so many decisions of this Court.

The Respondent further submitted that the application before this Court has been brought under section 24(1) and (2) of the Supreme Court of Appeal Act and that it is said to be an application pending hearing and determination of the appeal. He added that section 24 of the Supreme Court of appeal Act does not deal with applications pending hearing of an appeal but specifically deals with applications pending determination of the appeal. Thus, he continued to argue, since the appeal herein has not been heard it follows that the application brought herein is premature and must not be entertained on that basis alone.

The Respondent, though Counsel continued to submit that without prejudice to what they have submitted respecting their understanding of Section 24(1) of the Supreme Court of Appeal Act, the said

[20] MSCA Criminal Appeal No. 1 of 2020

section does not expound on the circumstances or factors which need to be considered before bail pending the hearing and determination of an appeal is granted. Nonetheless, the Respondent agrees with the Appellant that the Courts, through common law, have developed principles to be followed when exercising their discretion to grant or not to grant bail to a convict pending the hearing and determination of an appeal. Such discretion, it was submitted, can only be exercised if there are unusual, or exceptional circumstances. Thus, as propounded in the case of ***Suleman v R***[21], bail pending the determination of an appeal will only be granted where there are exceptional and unusual circumstances. It is well to observe though that the argument by the Respondent cannot stand in view of current jurisprudence propounded in ***Macdonald Kumwembe and others v Republic*** [22] where the Court instructively put it thus:

> "Bail in the interests of justice is granted after considering all the circumstances disclosed. Consequently, if there are specific or exceptional circumstances for refusing or allowing bail these must be brought to the court. Bail, however, will not be granted on proof or lack of proof of special or exceptional circumstances. Special or exceptional circumstances reduce or enhance the prospect of refusing or allowing bail."

It was further submitted that the burden to establish the exceptional and unusual circumstances warranting release on bail pending appeal is on the applicant. The Respondent submitted that, reading the Affidavit in support of the application and the supplementary Affidavit, the Applicant has failed to show any exceptional and unusual circumstance to warrant a stay of his sentence and to be admitted to bail. It added that, the Applicant's argument that there is no quorum in the Supreme Court to hear his appeal considering that some Justices of Appeal are conflicted in the matter and that this might cause delay is no proof of exceptional and unusual circumstance. Further, the Respondent is of the view that since the Practice Direction which the Applicant wants to rely on is administrative in nature, the Chief Justice, upon request owing to the peculiar circumstances of this case, may as well issue another Practice Direction forthwith on how cases of this nature can be handled or he can provide guidance on how this

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[21] [2004] MLR 398 (SCA),

[22] Miscellaneous Criminal Appeal Nos. 5A and 5B of 2017 decided on 14 March 2018

specific case should be handled. Furthermore, the Respondent is of the view that it is premature to rely on the issue of quorum as the appeal has not reached hearing stage and the issue of the four Judges being conflicted or the issue of having less number of Judges available to hear the appeal is not before the court and there is no ruling on that. On this basis, the Respondent submitted that it is premature for the Applicant to state that there will be delay in the hearing of the appeal. The Respondnet continued to argue that it is only when the appeal is ready for hearing, the judges have recused themselves, no new judges have been appointed to the Supreme Court and there is no direction on the matter and the appeal cannot be heard, that is when the argument being raised can be valid.

The Respondent noted that the Applicant is also arguing that there was a mistrial during the hearing of the case and that there was no evidence to support the conviction. It further noted that the Applicant is alleging that the conduct of the presiding Judge in the case and the Judge President of the Civil Division breached his constitutional right to fair trial and that on that basis he should be released on bail pending appeal. In response, the Respondent submitted that these issues go to the merits of the case and should be tested during the appeal hearing and not at this stage of the case.

Respecting the Applicant's reliance on his health concern and age as factors to be considered on his application for bail, it was the argument of the Respondent that the Applicant has failed to show that his health deteriorated since conviction and sentence to be regarded as an exceptional and unusual circumstance. The Respondent is of the view that a health concern on its own cannot be regarded as an exceptional circumstance as the Applicant is at the moment in good health as indicated in the medical reports exhibited in support of his application. Further, on the issue of age, the Respondent submitted that there are many convicts who have served custodial sentences at the age of 60 or more and some are still in custody serving and the Applicant is not different from the other convicts who served their sentences at that age. Therefore, the Respondent submitted, the issue of health concern and age raised by the Applicant does not qualify to be exceptional and unusual circumstance. The court should therefore dismiss this issue as it lacks merit.

The long and short of it is that Counsel submitted that the application herein is premature and that the Applicant has further failed to present before this Court exceptional and unusual circumstances for the

Court to exercise its discretion in favour of granting an order of stay of sentence and admission to bail pending appeal.

ANALYSIS AND DETERMINATION

THE LAW

Is the application premature?

It is the Respondent's contention that an application for bail can only be made after the appeal has been heard and not before. They have cited and relied on the case of ***Republic v Kaphamtengo***[23]. This interpretation of the words pending the determination of an appeal is incorrect for the following reasons-

First, it is inconsonant with all the decided case authorities this Court and the High Court have decided before and after the judgement in ***Republic v Kaphamtengo*** (supra) was made. None of the cases so far decided by this Court have followed this authority. This Court further observes that if this were to be the interpretation the High Court would not have had the power to determine bail pending appeal[24]. Secondly, this Court understands the law to be that although side notes are not part of the statute they aid interpretation of the section[25]. It is therefore this Court's view that the side notes to section 24 of the Supreme Court of Appeal Act are instructive and it states as follows: "Admission of appellant to bail and custody when attending court". This envisages that an Applicant can attend court while he is already out on bail. This view is further buttressed by what is provided for in Order IV Rule 13 (4) of the Supreme Court of Appeal Rules. The said Order IV Rule 13 (4) of the Supreme Court of Appeal Rules instructively provides as follows-

> "An appellant who has been admitted to bail shall be personally present at each and every hearing of his appeal and at the final determination thereof. The Court may, in the event of such

[23] MSCA Criminal Appeal No. 1 of 2020 (unreported)

[24] Section 356 of Criminal Procedure and Evidence Code

[25] Reserve Bank of Malalwi vs Finance Bank of Malawi Limited Constitutional Cause No 5 of 2010(unreported)

appellant not being present at any hearing of his appeal, if it thinks right so to do, decline to consider the appeal, and may proceed summarily to dismiss the same and may issue a warrant for the apprehension of the appellant in Criminal Form 11 in the Second Schedule:

Provided that the Court may consider the appeal in his absence, or make such other order as it thinks fit."

The above rule is so clear. An appellant who has been admitted to bail shall be personally present at each and every hearing of his appeal and at the final determination of the appeal. Thus, if the interpretation in ***Republic v Kaphamtengo*** case (supra) was correct then the above rule would not have envisaged the presence of the Applicant in court while he is out on bail. Furthermore, the interpretation being advocated by the Respondent is disingenuous. Pending in its natural meaning means "awaiting decision or settlement". So, when a convict is released on bail pending an appeal it means a person is released between the filing of an appeal and the handing down of a decision. Often a bail application is made in the Supreme Court of Appeal after bail has been refused by another court. After a bail application is made, there is a court hearing to decide whether or not the applicant should be released from custody to then attend a court for their case on a later date. It is for this reason therefore that if the court grants bail pending appellate review, the terms of bail may include that the appellant will duly prosecute the appeal.

Lastly, as this Court understands it, when a person is found guilty of a criminal offence by the court below it may impose a prison sentence. Thus, if the convict believes that he/she should not have been found guilty, or that he/she has been given an unreasonable sentence, then he may wish to appeal and be on bail pending the appeal. When the convict appeals, the court below must prepare and submit a number of documents including a notice of appeal, factum detailing his argument and transcript of the proceedings. Only once all of this information has been gathered can an appeal hearing take place. This means there can be a significant delay between a conviction and the appeal hearing. During this time, a convict must remain in custody – unless he is granted bail. It is for this reason that Section 24 of the Supreme Court of appeal Act comes in. If a convict is granted bail pending appeal, he can return home, on the promise that he will return to custody when requested.

Bail pending the hearing and determination of appeal

As this Court understands the law, in an application for a bail pending the hearing and determination of appeal, the presumption of innocence does not apply as the appellant is presumed to have been properly convicted until the appellate court determines otherwise. It is also presumed that the appellant has been properly sentenced. The considerations in an application for bail pending appeal are thus different from those applicable to an application for bail pending trial. Several cases have dealt with this matter.

As noted earlier, both the Appellant and the Respondent agree that section 24(1) of the Supreme Court of Appeal Act, does not expound on the circumstances or factors which need to be considered before bail pending appeal is granted. Both parties further agree that the Courts, through common law, have developed principles to be followed when exercising their discretion to grant or not to grant bail to a convict pending the determination of an appeal. A litany of cases are replete with the proposition that such exercise of discretion to grant or not to grant bail to a convict pending the determination of an appeal is exercised if there are unusual, or exceptional circumstances[26]. However, it should be noted that these cases were decided before the decisions in, inter alia, ***Macdonald Kumwembe and others v Republic*** [27] which shall be discussed shortly. Suffice to point out at this stage that there is now new jurisprudence further explaining how the discretion is exercised and the circumstances that will necessitate the granting of bail pending the hearing and determination of an appeal. In ***Macdonald Kumwembe and others v Republic,*** Justice of Appeal Mwaungulu SC cogently put it thus:

> "The discretion that a court has under statutes, given that the right to release with or without bail is a fundamental right under the Constitution, is that the outcome depends on considering all the circumstances of the case and on principles. It is important, therefore, that a lot more information

[26] Suleman v R (2004) MLR 398 (SCA); Joseph Kapinga and another v R MSCA Crim Appeal no 16 of 2017

[27] Miscellaneous Criminal Appeal Nos. 5A and 5B of 2017 decided on 14 March 2018; see also *Peter Katasya v R MSCA Crim Appeal no 11 of 2020*

covering all aspects of the discretion is available to a judge for a better exercise of the discretion. Consequently, a court considering an application for bail pending appeal, must consider all the circumstances of the matter, exceptional or not, and determine whether it is in the interests of justice to refuse or allow the prisoner on bail awaiting an appeal hearing. Exceptional circumstances better the prospect of granting bail. They are not sine qua nona bail must be refused or allowed. Bail must be refused or allowed in the interests of justice of the State and the prisoner — having regard to all pertinent factors and circumstances. Discretion is improperly exercised where a court fails disregards a material consideration, overstresses a minor factor or undermines a major factor.

In applications for bail pending appeal, the prospect of injustice, more especially for the innocent, trumps the usual concern that there is no need for reconsideration because there is an existing conviction. The innocent should not be in confinement for a day longer. It is because of the prospect of injustice that under the Criminal Procedure Rules, England and Wales, applicable to Malawi because of section 8 (a) of the Supreme Court of Appeal Act, the law now, to afford early consideration, require that an application for bail pending appeal must accompany the Notice of Appeal. It is very problematic, therefore, where the application is left to very late."

Further, more recently Justice of Appeal Chikopa SC in ***Peter Katasya v R*** [28] instructively put it as follows:

"[T]he applicant has spoken about his appeals good prospect, his not being a flight risk and the fact that he will have served the sentence by the time the appeal is heard. We do not think they, taken together or each by itself amount to special enough reasons to move us into exercising our discretion in the applicant 's favour. Every convict touts the merits of their appeals. On our part we are always wary of testing such merits. There is always the temptation to while so doing deal with the appeal itself This court has no mandate to do so. Of course, there is always that once in a while case where the conviction or sentence is so clearly untenable an appellate court is entitled

[28] MSCA Crim Appeal No. 11 of 2020

to admit an applicant to bail pending appeal on an appeals prospect of success.... the allegation that an appeal process is moving too slowly and that the record of appeal has not even been settled is not by itself is not good or special enough a reason to admit the application to bail pending appeal. There is a better, and we daresay more equitable fashion, of retrieving the situation". .... Further, the prospect of success may be such a circumstance, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold if, for example, there are other facts which persuade the court that society will probably be endangered by the appellant's release or there is clear evidence of an intention to avoid the grasp of the law. The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence. Such matters, together with all other negative factors, will be cast into the scale with factors favourable to the accused, such as stable home and work circumstances, strict adherence to bail conditions over a long period, a previously clear record and so on. **If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.**" (Underlining and emphasis supplied by me)

As will be observed from these two recent cases, whether or not bail must be refused or allowed is premised on the interests of justice of the State and the prisoner having regard to the presence or absence of all pertinent factors and circumstances (unusual and exceptional)[29].

Prospect of success on appeal.

The Respondent argues that it is not enough for an applicant for bail pending hearing and determination of appeal to say there is good prospect that he will succeed on appeal. This Court would wish to add that the prospects of success do not in itself amount to exceptional circumstances as envisaged by the Act. As this Court understands it, a court dealing with an application for bail pending hearing and

[29] See also *S v Smith and Another*, (1969) (4) SA 175, 177 (N), a South African case

determination of an appeal is enjoined to consider all relevant factors including whether the appeal is likely to succeed and determine whether individually or cumulatively they constitute exceptional circumstances which would justify his release. Further, in evaluating the prospects of success it is not the function of this Court to analyse the evidence in the Court a quo in great detail. As to what the Court should have at the back of its mind as it deals with an application under section 24 of the Supreme Court of Appeal Act, the case of ***Macdonald Kumwembe and others v Republic*** (supra) is again illuminating and instructive. The Court aptly said as follows:

> "In considering this question, **a court should be wary that an application for bail pending appeal is not any way closer to an appeal hearing. The decision proceeds on the judgment (on the facts and law), grounds of appeal and such affidavit evidence proffered. The court cannot have to look at the whole record. In some cases, probably the majority, this is impossible. Where it is possible, the record should be perused. The court is only considering the prospect of success of the appeal for determining whether it is in the interests of justice to refuse or grant bail.**
>
> Is the appeal more likely to succeed?
>
> **Once a court concludes that there is a matter to go to appeal it must evaluate its likelihood for success. Not all appealable grounds will succeed: they could be so peripheral to the issue as to be of no consequence. The court could, even if a ground is appealable decide that there is no miscarriage of justice. The higher the likelihood of the success the higher the likelihood of being released on bail.**" (Underlining and emphasis supplied by me)

This Court adopts the above dictum and it will adopt the approach captured above as it is assessessing whether or not to grant bail to the applicant (Appellant).

Practice Direction

in the case under consideration, the Respondent is of the view that since the Practice Direction which the Applicant wants to rely on is administrative in nature, the Chief Justice, upon request owing to the peculiar circumstances of this case, which obviously The Chief Justice at the time of issuing the Practice

Direction did not envisage, may as well issue another Practice Direction forthwith on how cases of this nature can be handled or he can provide guidance on how this specific case should be handled.

Practice Directions are not administrative in nature as is being suggested by the Respondent. It is well to observe that the source statute of the Supreme Court of Appeal Rules together with its array of Practice Directions are Sections 59 and 67 of the Courts Act as well as Section 27 of the Supreme Court of Appeal Act. Further, the Court of Appeal of Appeal in England and Wales further considered the role of Practice Directions in ***Secretary of State for Communities and Local Government v Bovale Ltd*** [30] where they were concerned at the extent to which a judge may depart from statutory Practice Directions; and where to make "gap" directions (where existing Practice Directions do not cover a particular state of affairs not envisaged by rule-makers. In ***Bovale*** case (supra) Lord Justices Waller and Dyson issued a joint judgement. The court considered the extent to which a Practice Direction is binding on a court. Thus, they opined that a Practice Direction, properly made, is statutory and tells a litigant to do something. If they do not a process or an application, for example, can be struck out. There are consequences for not abiding by a Practice Direction. A "direction" is what it says: a requirement to a party to do (or not to do) something. These Practice Direction and measures were described by Sir William Wade described, in *Administrative Law* (2014) Wade & Forsyth, as the "jungle" of sub-delegated legislation. Contrary to what the Respondents say, a Practice Direction is not administrative in nature. Where do practice directions come from? Practice Directions are statutory. They may be part of a set of rules; or they may be made on a free-standing basis by divisions of the Court including the Supreme Court of Appeal. Further, this Court also finds it troubling when it is being suggested that Practice Direction Number 1 of 2018 should be revised or reviewed just because of the appeal by the Appellant. The Court shall address this issue later in this ruling.

DETERMINATION

[30] [2009] EWCA Civ 171, [2009] 1 WLR 2274

The Court now turns to consider each of the applicant's personal circumstances to determine whether or not he should be granted bail pending the hearing and determination of the appeal that he has filed. From the record it will show that the Appellant herein appeared before the High Court sitting in Blantyre charged with six counts under the Corrupt Practices Act. On 10 September 2021, after full trial the court below delivered its judgement and the Applicant was found guilty of two counts out of the six that were proffered against him, namely, attempting to induce a public officer to perform functions corruptly, contrary to section 25A (2) of the Corrupt Practice Act and Offering an advantage to a public officer, contrary to section 24 (2) of the Corrupt Practice Act. This Court has had occasion to read through the Judgement and Sentence imposed by the court below. The relevant parts of the court's determination were as follows:

> "Court's determination
>
> 45. Having analysed the evidence in its totality, this Court finds that the evidence points to the guilt of the accused person as there is no other possible explanation. To that extent, this Court finds the accused person, Thomson Frank Mpinganjira guilty as charged under Count 1 and Count 4, for corruptly offering an advantage to Justice Tembo and Justice Potani, who were public officers for the benefit of the other judges namely, Justice Ivy Chatha Kamanga, Justice Dingiswayo Madise and Justice Redson Kapindu, as an inducement that the judges decide the Constitutional Reference Case Number 1 of 2019 in favour of the Respondents. The accused person is hereby convicted accordingly.
>
> 46. The other counts, 2nd Count, 3rd Count, 5th Count, and 6th Count were in the alternative and they fall away."

Following the conviction, and after addressing the Court on sentencing especially in terms of mitigating circumstances [including, *inter alia,* that the Appellant is a first offender, that he is advanced in age, that he has underlying medical conditions and that he is a reliable member of the society], on October 5, 2021, the Court sentenced the Appellant to 9 years imprisonment with hard labour on both counts.

Dissatisfied with both the convictions and the sentences, the Applicant has filed a Notice of Appeal. Further, he applied to the court below for bail pending the hearing and determination of appeal pursuant to Section 359 of the Criminal Procedure and Evidence Code. On 22 December 2021, the court below dismissed the Appellant's said application for bail pending. He has now approached this Court wishing to be released on bail pending the hearing and determination of appeal.

Bail

Admitting an accused or convicted person to bail entails the striking of a balance of proportionality in considering the rights of the applicant, and the public interest on the other. On the one hand it is the duty of the court to ensure that crime where it is proved, is appropriately punished, this is for the protection of society; on the other hand, it is equally the duty of the court to uphold the rights of persons charged with or convicted of criminal offences, particularly the human rights guaranteed under the constitution. This position has been expressed by the Supreme Court Appeal in various cases discussed above including that of ***Kumwembe et al v Republic*** (supra). As this Court understands it, the cornerstone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right to appeal. Incarceration before trial or pending the hearing and determination of an appeal cuts against this principle. The need for bail is to assure that the accused or convicted person will appear for trial or appeal hearing and not to corrupt the legal process by absconding. Anything more is excessive and punitive. Thus, in the Supreme Court of Appeal, in an application for a bail pending the hearing and determination of an appeal, the presumption of innocence does not apply as the appellant is presumed to have been properly convicted until the appellate court determines otherwise. It is also presumed that the appellant has been properly sentenced. However, being a convicted person does not mean that the convicted person cannot be granted bail pending the hearing and determination of his appeal. The considerations in an application for bail pending appeal are thus different from those applicable to an application for bail pending trial. As it were, once a court finds and concludes that there is a matter to go to appeal it must evaluate its likelihood of success.

Recently several cases have dealt with this matter of how the discretion to grant bail pending the hearing and determination of an appeal should be exercised. Of the so many, there are two that are very

If, while on bail, the prisoner, planned an escape, the prospect of appearing are there but very much reduced. Equally, if the prisoner never complied with bail conditions, the likelihood of playing truant with the court are higher. Ultimately, the State might demonstrate that the prospect of the prisoner showing up to serve the sentence are remote. The criminal law is publicly enforced for purposes of punishing and preventing crime while offering opportunity for reform and rehabilitation in the prison sentences passed. Where, therefore, the prospects are that this will not happen, it is in the interests of justice, even where there is a prospect of success, to refuse bail. These immediate and prospective concerns might demonstrate that it is in the interests of justice not to release the prisoner on bail.

Will the interests of justice be served by releasing the prisoner on bail?

The second consideration, therefore, is whether it is in the interests of justice to release the prisoner on bail now that there is a prospect that the appeal will succeed. The onus of proof to demonstrate that it is in the interests of justice to be released on bail is on the prisoner whether the court is considering the matter suo motu or the prisoner is the applicant's. When the prisoner is the applicant, the burden follows the normal. The applicant must prove the claim. The prisoner discharges the burden not even necessarily on a balance of probabilities. It suffices if the prisoner shows that it is in the interests of justice to be released on bail. Once that is done, the State must demonstrate on balance of probabilities that it is not in the interests of justice to release the prisoner on bail or, which is the same thing, that it is in the interests of justice that the prisoner be detained or further detained.

Where it is unclear whether the interests of justice will be served by confinement or release on bail.

Where it is unclear whether the interests of justice will be served by confinement or release on bail, a court should uphold liberty — the right to liberty. The prisoner must be released on bail. Our constitutional order bases on fundamental rights which, unless limited by laws that are of general application, reasonable, proportionate and accepted in an open democratic society — which Malawi is — must be upheld. Equally, therefore, will it be the case where the matter is on balance.

Where the matters are on balance on interests of justice.

Where interests of justice can be served equally by confinement or by release on bail, the appellant should be released on bail. This is precisely because interests of justice are just interests — they cannot torpedo rights. Where rights and interests conflict at point of no resolution, rights must be taken seriously — Ronald Dworkin, Taking Rights Seriously, Bloomsbury, 1997, London, New Delhi, New York, Sydney.

The discretion

I am the most reluctant to suggest that bail pending appeal is a matter of discretion where that means that a court can refuse bail where it should be given and allow bail where it should not be given. The discretion that a court has under statutes, given that the right to release with or without bail is a fundamental right under the Constitution, is that the outcome depends on considering all the circumstances of the case and on principles. It is important, therefore, that a lot more information covering all aspects of the discretion is available to a judge for a better exercise of the discretion. Consequently, a court considering an application for bail pending appeal, must consider all the circumstances of the matter, exceptional or not, and determine whether it is in the interests of justice to refuse or allow the prisoner on bail awaiting an appeal hearing. Exceptional circumstances better the prospect of granting bail. They are not sine qua nona bail must be refused or allowed. Bail must be refused or allowed in the interests of justice — of the State and the prisoner — having regard to all pertinent factors and circumstances. Discretion is improperly exercised where a court fails disregards a material consideration, overstresses a minor factor or undermines a major factor.

In applications for bail pending appeal, the prospect of injustice, more especially for the innocent, trumps the usual concern that there is no need for reconsideration because there is an existing conviction. The innocent should not be in confinement for a day longer. It is because of the prospect of injustice that under the Criminal Procedure Rules, England and Wales, applicable to Malawi because of section 8 (a) of the Supreme Court of Appeal Act, the law now, to afford early consideration, require that an application for bail pending appeal must accompany the Notice of Appeal. It is very problematic,

therefore, where the application is left to very late." (Underlining and emphasis supplied by me)

The dicta quoted above has so many principles of law that now inform the courts on how the discretion to grant bail pending the hearing and determination of an appeal should be exercised. In sum, in an application for bail pending the hearing and determination of an appeal the conditions to be satisfied in an application for bail pending hearing of an appeal are as follows: - Bail is granted at the discretion of the court; the court must be satisfied that there are exceptional circumstances that are disclosed in the application. The existence of exceptional or unusual circumstances upon which a court of appeal can fairly conclude that it is in the interest of justice to grant bail is one of the key principles that the court considers prior to granting bail or bond pending appeal.

It is not for the court to delve into the merits of each ground of appeal. But it suffices that all the grounds are examined, and a conclusion is made that prima facie there are prospects of success of the appeal. If it appears prima face from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists. In sum, the ***Kumwembe et al v Republic*** case (supra) represents the new jurisprudence on how the discretion to grant bail pending the hearing and determination should be exercised. This Court has no reason to depart from the principles of law enunciated in this case.

Delay in the appeal processes

What is the argument of the Appellant on the effect of Practice Direction No, 1 of 2018? It is the Appellant's contention that since the Supreme Court of Appeal is unlikely to be Quorate anytime soon following the likelihood that the Judges who were comprised in the constitutional case, the subject of these case will recuse themselves from handling this case, the appeal herein may not take place anytime soon. It is the further argument of the Appellant that, in terms of the Supreme Court of Appeal Practice Direction Number 1 of 2018, for the appeal herein to be heard it will require at least 7 members the Supreme Court of Appeal. Thus, when Judges who handled the case in issue are discounted the remaining Supreme Court Judges fall below the minimum number of 7 Judges as required by the said Practice Direction Number 1 of 2018. The Appellant adds that this case can only take place when more Supreme Court Judges are appointed but nobody knows when

new Supreme Court Judges will be appointed since such prerogative lies with the President. It is therefore not known when the court will become quorate. The Appellant has then brought to this Court's attention that delays in the appeal processes were considered sufficient unusual or exceptional circumstances warranting granting bail in the case of ***Chikwewa v Republic***[31] and ***Sumaili v Republic***[32].

The respondents have contended that the Chief Justice might issue another Supreme Court Practice Direction in respect of this particular case and that more judges of the Supreme Court are likely to be appointed. The assertion that more judges of the Supreme Court are likely to be appointed to be appointed soon has not been backed by any authoritative evidence. It is a speculative assertion as it is not known when more Judges will be appointed to the Supreme Court. As regards the contention the Chief Justice might issue another Supreme Court Practice Direction in respect of this particular case, all this Court can say is that such an argument is so concerning. It runs counter to the rule of law as it is advocating for a different law to apply to the Appellant and another law for other people.

Further, it is well to note that a closer look at the objectives upon which the Supreme Court of Appeal Practice Direction Number 1 of 2018 was issued, it is doubtful that the Chief Justice might want to go against the fundamental principles upon which the current Supreme Court Practice Direction was based. The Supreme Court of Appeal Practice Direction Number 1 of 2018 shows that the reason why it is mandatory that a full bench of the supreme court of Appeal should be constituted to hear an appeal was to avoid the Supreme Court of Appeal issuing conflicting judgements. The Chief Justice was of the view that conflicting Supreme Court of Appeal Judgements made it difficult for Legal Practitioners to advise their clients with consistency on particular issues where the judgements of the Supreme Court of Appeal were in conflict. Thus, if the Chief Justice issued a special practice direction to take care of the circumstances under the present case by the time the country is faced with 3 or 4 cases like the present one the country will have 3 or 4 conflicting judgements in respect of those special matters. It is therefore unlikely that

[31] [1995] 1 MLR

[32] [1961-1963] 2 ALR Mal 552

the Chief Justice would want to go against the very objective he was trying to avoid when Practice Direction Number 1 of 2018 was issued.

It was observed by the court below that section 105 of the Constitution provides for the seating of a minimum of 3 Supreme Court of Appeal Judges. As this Court understands it, section 105 of the Constitution is not the procedural law of the Supreme Court of Appeal[33]. Further, the fact is that the practice of the Supreme Court of Appeal, which has become statutory is that since 2018, the Supreme Court of Appeal has consistently refused to empanel a Supreme Court of Appeal with a quorum of 3 Justices of Appeal. The question that arises is: why should the constitutional provision be followed this time around when it is the applicant's case under determination? This Court finds that accepting the interpretation advanced in the court below would amount to this Court condoning discrimination which will be deemed to be acting in a discriminatory manner contrary to the provision of section 20(1) of the Constitution. The equality clause in the Constitution must be applied at all times.

However, the above observations notwithstanding, this Court agrees with the Respondent that it is premature to rely on the issue of quorum now as the appeal has not reached the hearing stage and the issue of the four Judges being conflicted, or the issue of having less number of Judges available to hear the appeal, is not yet before the Court and there is no ruling on it. It is only when the appeal is ready for hearing; the judges have recused themselves; no new judges have been appointed to the Supreme Court of Appeal; and there is no direction on the matter and the appeal cannot be heard, that is when the argument being raised can be valid. Otherwise, at present, it is premature to rely on this argument.

As this Court understands it, pursuant to section 24 of the Supreme Court of Appeal Act, this Court may admit the appellant to bail pending the determination of his appeal if the Court deems it fit to do so. Further, section 24 of the Supreme Court Act does provide that where the appeal is successful the period during which the appellant was on bail shall be excluded in calculating the sentence meted by the lower court. It also provides that the sentence shall resume from the date the accused is received again into prison under the sentence.

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[33] ***F.C.D.A v Ezinkwo*** [2007] ALL FWLR (Pt 393) 95

It will be noted, from a reading of section 24 of the said Supreme Court Act, that the discretion to grant bail to an appellant pending the determination of his appeal is not limited. Neither are the circumstances under which the court deems it fit to admit the appellant to bail limited. As alluded to earlier, the limitation only comes by operation of the common law. Further, there is a discussion by this Court to the effect that two circumstances (exceptional and unusual) must exist if an order for bail pending the determination of his appeal is to issue. The said exceptional and unusual circumstances must be shown to warrant bail pending the determination and hearing of an appeal being granted. The first one of the exceptional and unusual circumstances is that the appeal is likely to be successful and the second one is that there is a risk that by the time the appeal is heard the sentence would have been served. In the case of ***Joseph Kapinga and another v Republic*** (supra) this Court, through Justice of Appeal Twea SC, actually expressed the opinion that the Court should determine the question whether there is a likelihood of the appeal succeeding in dealing with an application of this nature. He stated that the Court should do so by "(addressing) its mind, among other things, to the grounds of appeal, the strength of the evidence and the likelihood of success." It was the further opinion of the Court that the courts have developed the principles that the discretionary power should only be exercised where there are unusual or exceptional circumstances. The two conditions are some of the many exceptional circumstances the court can look at. The Court further observed that the list of what amounts to exceptional circumstances is not exhausted or closed. It is open to the Court to develop others. This Court has observed that the circumstances need not co-occur as either of them can constitute special circumstances. There is a litany of cases discussed above that have also demonstrated that the list of exceptional circumstances is not closed.

Further, the Courts in this jurisdiction have also observed that apart from the above two circumstances (that the appeal is likely to be successful and that there is a risk that by the time the appeal is heard the sentence will have been served), there could be more circumstances that can lead a court to conclude that there are unusual and exceptionally circumstances.[34] One of the circumstances is the likelihood that the appeal cannot be concluded within a reasonably short time. Furthermore, the case of ***Macdonald Kumwembe and others vs. Republic*** (supra) is for the proposition that in determining an application for bail pending appeal, the courts are determining

[34] *William Dovu v Republic* Criminal Case No.8 of 2016

a measure that will serve the interest of justice. As it were, interests of justice are what must be looked at in determining all these unusual or exceptional circumstances. It is well to observe that the decision in the ***Joseph Kapinga and another*** case echoed what the sentiments were in ***Macdonald Kumwembe and others v Republic***. The two decisions are for the proposition that in bail pending the hearing and the determination of an appeal the correct focus for the Court is that justice must be achieved, and injustice avoided when the court finally determines the appeal[35]. This Court finds no reason why it should depart from the propositions from these decisions, namely, ***Macdonald Kumwembe and others v Republic*** and ***Joseph Kapinga and another v Republic*** (supra). This Court would wish to add that this is not the state of the law in Malawi only but also in a comparable jurisdiction like South Africa[36]. In ***Smith v S*** (supra), the court made similar observations that the interests of justice should be the preoccupation of the court in applications for bail pending the hearing and determination of an appeal. Just like in this jurisdiction, the South African court observed that most of the circumstances that are relevant to consideration of bail prior to conviction differ in emphasis from bail pending an appeal after the conviction. Again, just lie here, the constitutional requirements that the accused may be released on bail unless the interests of justice requires otherwise still persists. Accordingly, the constitutional requirements under section 42(2)(e) of the Constitution of the Republic of Malawi do not fall away on application for bail pending the hearing and determination of an appeal. Thus, this Court will have to determine whether or not, under section 42(2)(e) of the Constitution of the Republic of Malawi, the interest of justice requires that bail be granted to the Applicant. As it were, this Court's decision will be informed by the position at law that in bail pending the hearing and the determination of an appeal the correct focus is that justice must be achieved, and injustice avoided when the Court finally determines the appeal. This Court will now explore the three unusual or exceptional circumstances the Appellant relies on in this application. It will then determine whether or not those circumstances make a good case requiring this Court to grant the Appellant bail.

[35] See also Jose Manuel and others vs. Republic Criminal Appeal No. 17 of 2017.

[36] *Smith v S* (CA & R 150/09) [2009] ZAECGHC 52 (18 August 2009),

Is there a likelihood that the appeal will succeed?

An examination of the Judgement reveals that the core part of the case is that the Applicant requested Justice M. A. Tembo for contacts for Judge Potani (as he then was), who chaired the Constitutional court case to give him a parcel. It is said that it had come to the attention of the accused (the Appellant) that the other players in the constitutional case were allegedly giving money to the Judges. This apparently came out of the testimony of Justice H. S. B Potani in his testimony. Further, it is not a disputed fact that the applicant knew Justice M. A. Tembo. They were praying together at a Church in Sunnyside. They visited each other's houses. There is no denying of the fact that to prove the case against the Appellant there was need to be prove at the trial that there was an envelope containing unspecified amount of money that was offered to Justice M. A. Tembo and Justice Potani, who was a lead Judge in the constitutional case. In this regard, the evidence proffered to prove the allegations against the Appellant was as follows: that there was a parcel that was allegedly coming from somebody else and not the accused. The court below, in its judgement, notes that Justice M. A Tembo informed the court that he told the accused person that he needed to know why he wanted Justice H.S.B Potani because he was not the one who gave Justice H.S.B Potani the money. It is further noted by the court below that the accused person told Justice M. A Tembo that he had been given a parcel and that he had opened it there was cash inside. He even said that he had been given the parcel to give to Justice H.S.B Potani". It is worth noting that none of the other witnesses saw the parcel.

The judgement further alludes to the fact that Justice M. A Tembo asked the accused person if Justice H.S.B Potani knew that someone was sending him a parcel through the accused person whereupon it is said that the accused person replied that what he had told Justice HSB Potani was that he was given a parcel to pass on to Justice H.S.B Potani and that he had checked inside the parcel and the parcel contained cash. That is what the evidence revealed. But, it is common cause that no cash was produced before the court. Further, the analysis of the evidence by the court does not show or establish from whom this parcel was coming from. And, in stark contrast to the testimony of Justice M. A. Tembo, Justice H.S.B Potani stated that he the accused never mentioned to him any amount of money in the parcel. The accused simply referred to a parcel. Justice Potani further stated the parcel could have contained face masks or bottles of water. There was no finding by the court below as to which evidence was cogent as between the two conflicting testimonies of

Justice M. A Tembo and Justice H.S.B Potani. Now, if the evidence of Justice H.S.B Potani is discounted this Court only remains with the evidence of Justice M.A Tembo. It will be noted that his evidence hinged on a phone recording he alleges he recorded to a telephone conversation with the Applicant. At paragraph 5 of the judgement, the court below stated the following respecting the phone call recording:

> "The witness later told the court that he recorded the calls that the accused person made to him and that he submitted the recordings as well as print-out of his WhatsApp messages with the accused person to the ACB as part of his evidence. The witness concluded his testimony by emphasizing that according to him, the accused person wanted to offer him and the Judges a parcel containing money to induce or influence them to decide the election constitutional Reference case number 1 of 2019.
>
> In cross examination, the witness was asked to verify a number of issues in the transcript, and the evidence he had given under oath, which he did. He told the court that he has been a judge since 2013, and he knew the accused from 2010 when he started congregation at Sunnyside Seventhday Church. He told the court that he sat in the sabbath together with the accused and they visited each other's homes as church members. He stated that he made the recordings on 24th October 2019 on the phone app automatically and 30th October 2019, on loudspeaker recording on his iPad as he wanted to share with colleagues what transpired and, if matters came to a head, report the issues to authorities. The accused person contacted him on 4 occasions. The matter was reported to the Chief Justice who later reported to ACB. The panel of judges decided to report the matter after hearing the case because of the sensitivity of the case and its national interest. The witness was apprehensive at that time because there was so much being reported in social media." (sic)

Now, in the case of ***Brown Mpinganjira v Dumbo Lemani and Davis Kapito***[37] it was held that such recording is not admissible in evidence as it is deemed to be hearsay evidence unless there is testimony defining and describing the provenance and history of the recording up to the moment of its production in court. The Court in the case of ***Brown Mpinganjira v Dumbo Lemani and Davis Kapito*** (supra) further stated as follows in the judgement:

[37] Civil Cause No. 222 of 2001

"Whilst it is admitted that the production of mechanically produced evidence, such as photographs, tapes and the like do not constitute an infringement of the hearsay evidence rule **it is still trite law that a party relying on a film or (a video tape) must satisfy the court that it is authentic and before this piece of evidence is allowed into evidence there must be testimony defining and describing the provenance and history of the recording up to the moment of its production in court as an item of real evidence** - R -vs- Robson and Harris (1972)2 All E.R. 699; (1972)1 WLR 651. The reason for having this rule of evidence and/or law, as rightly pointed out by Mr Phoya of Counsel, is because tape recordings are susceptible to being altered by the transposition, excision and insertion of words and phrases. Such modification may escape detection and even elude technical experts." (Emphasis supplied by me)

Further, the Court observed as follows in the judgement:

"In as much as the contents of a video tape, on which a party relies, may be proved by the testimony of the person who has seen the video tape, that evidence can only be allowed if the history and provenance of same is defined, described and explained. In view of the above observations will it be in the interest of justice that this video tape be accepted in evidence or that this court should accept as the truth what Mr Ralph Kasambara has deponed regarding the contents of the tape?

If this court were to accept that video tapes, whose origins are not explained, should be allowed in evidence to prove matters in issue, then there will be no safeguards to the liberty of individuals in this country. It will be most unsafe, when the liberty of a subject is concerned, to admit a video tape as evidence when its source and history is not known, that would give room to an unscrupulous litigant, or indeed even the state, to manufacture evidence to be used in proceedings whose consequence would be the loss of liberty of an individual. That will be bad for our country. The Rights Human and Freedoms enshrined in our new Constitution will be rendered useless if the courts are not cautious and do not get satisfied about the source and history of this type of real evidence. This video tape goes to the heart of the issue in these proceedings and it would be highly prejudicial from the Defendants point of view due regard being had to the observations that I have made above. The video tape was relevant, if not

crucial, to the Plaintiff's case and it could have been admitted in evidence as real evidence had it not been for this doubt as regards its origin and history and also as to whether it is an original or a copy. This court will be slow in accepting such type of video tape into evidence where the liberty of a person is involved." (Emphasis supplied by me)

As this Court understands it, subject to what the Supreme Court of Appeal might say and conclude on appeal, the dicta above still stands true today and represents the law respecting audio recordings as evidence. The Human Rights and Freedoms enshrined in our Constitution will be rendered useless if the trial courts are not cautious and do not get satisfied or do not warn themselves of the danger of audio recordings as well as about the source and history of this type of real evidence. It should not matter that the Appellant confirmed or admitted a conversation ensued between him and a prosecution's witness. If such were to happen, would it not mean that the courts of justice will be allowed to admit illegally obtained evidence like for example wire tapping without the sanction of the court? It is trusted that the Court will investigate these questions on appeal if they arise. In any event, it is common knowledge that accused's evidence should never be used to augment the evidence of the prosecution[38]. The Prosecutor's duty to prove the case beyond reasonable is a stand-alone duty for the Prosecution and it remains with the prosecution throughout trial. Further, it is well to remember that section 42 (2) (f) (viii) of the Constitution accords a convicted person the right to have recourse by way of appeal or review to a higher court than the court of first instance.

Further, turning to what the court below said on the audio recordings that was put in evidence, there is no evidence to give an account of how the tape first came into existence and how it had since been kept in safe and secure custody up to the time it was produced in evidence in the court below without the opportunity for fabrication or tampering of any kind. In addition, the court below

[38] However, see paragraph 44 of the judgement in the court below where it is recorded:

"The accused person has presented himself as a person not affiliated or interested in any one political party. While the evidence prosecution is mandated by the law to prove the case against an accused person, the evidence of the accused person is also critical to show the veracity of his claims. Indeed, the evidence of the accused person herein was meant to show that the accused person was not partial to any political party as he helped all political parties. However, in cross examination by the State, the accused person successfully showed that he was in fact affiliated with the DPP as a political party than any other political party."

did not warn itself of the danger of audio recordings in light of what the case of ***Brown Mpinganjira v Dumbo Lemani and Davis Kapito*** (supra) advised. This Court is not saying that Justice M.A Tembo tampered with the recordings from the time he recorded the calls that the accused person made to him and to the time he submitted the recordings as well as print-out of his WhatsApp messages with the accused person to the ACB as part of his evidence. All it is saying is that Appellant worries that there might have been an opportunity for tampering with it as the court below did not satisfy itself how safe the phone was all throughout the period it was in custody of Justice M.A Tembo up to the time it was handed over to the ACB and eventually tendered in evidence.In actual fact, it would appear that the Appellant intends to argue at the appeal that if this evidence is excluded there is a likelihood that his appeal will succeed as without the evidence of Justice Tembo's recordings, the prosecution's case would crumble. Therefore, prospects are very high that the appeal may succeed and that therefore bail pending the hearing and determination of the appeal should be granted. This Court agrees with the argument and submission by the Appellant. Subject to what the full bench of this Court might find and conclude, and being cognizant to what was held in the case of ***Brown Mpinganjira v Dumbo Lemani and Davis Kapito*** (supra), it appears that prima facie, from the totality of the circumstances of this case, the appeal is likely to be successful on account of some substantial point of law to be argued respecting the admissibility of the phone recording.

Additionally, it is well to observe that the Appellant was convicted of two offences of offering an advantage to public officers contrary to section 24(2) of the Corrupt Practices Act. After full trial, he was convicted of the offences of corruptly offering an advantage to Justice Tembo and Justice Potani who are public officers for the benefit of the other judges, namely, Justice Ivy Chatha Kamanga, Justice Dingiswayo Madise and Justice Redson Kapindu as an inducement for the judges to decide ***Constitutional of Preference Case Number 1 of 2019*** in favour of the respondents. The accused was not convicted of the offences of attempting or inducing public officers to perform their functions corruptly.

On examination of all the circumstances in this case, subject to this Court's determination on appeal, it remains to be seen whether a court could come only to one conclusion that the only inference to be drawn from them is that the accused person corruptly offered an advantage to Justice Tembo, Justice Potani and the others as an inducement that they decide Constitution

Reference Case Number 1 of 2019 in favour of the respondents. In saying this the Court is alive to what the court below said in its judgement when analysing the applicable law of evidence and making a determination. It will be noted that in paragraph 27 of its judgement the trial Judge relied on circumstantial evidence. Further, the court below relied on circumstantial evidence as is seen in paragraph 45 of the court's judgement where the court determined as follows:

> "Court's determination
>
> Having analysed the evidence in its totality, this Court finds that the evidence points to the guilt of the accused person as there is no other possible explanation. To that extent, this Court finds the accused person, Thomson Frank Mpinganjira guilty as charged under Count 1 and Count 4, for corruptly offering an advantage to Justice Tembo and Justice Potani, who were public officers for the benefit of the other judges namely, Justice Ivy Chatha Kamanga, Justice Dingiswayo Madise and Justice Redson Kapindu, as an inducement that the judges decide the Constitutional Reference Case Number 1 of 2019 in favour of the Respondents. The accused person is hereby convicted accordingly."

The court relied on the case of ***R v Taylor*** [39] restating that circumstantial evidence is often the best evidence. It added that it is evidence of circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. Further, in the said paragraph 27 of its judgement the Judge relied on the case of ***Director of Public Prosecution v Kilbourne*** [40] when he said that circumstantial evidence works cumulatively and in geometrical progression eliminating other possibilities. The court went on to quote the Judge in the case of ***Viyaviya v Republic***[41], that states that a court of law can only convict an accused person if one inference and one inference only is possible. Where several inferences are open some inconsistent with innocence and others consistent with guilt, it is not open to the court to convict in the absence of any other evidence. Thus, the cases that the court below reviewed suggests that circumstantial evidence requires a thorough scrutiny of the circumstances surrounding the case. There appears to have been three scenarios that the evidence presented. An examination of the judgement reveals

[39] [1928] 21 Cr. App. R 20

[40] [1973] AC 729

[41] [2002- 2003] MLR 423(SCA)

that there was indeed what was called a devil haunting the Democratic Progressive Party that their adversaries were giving money to the constitutional court judges. It is evidently clear from the judgement that the court below noted that 3 steps were taken by the Democratic Progressive Party. These were that: It said that the first step it appears was that Brown Mpinganjira of the Democratic Progressive Party allegedly met Justice of Appeal Chikopa who it is alleged was driven to his residence by Justice Potani. It is further put by the court below in its analysis of the evidence that Justice Chikopa allegedly informed Brown Mpinganjira that judges do not receive money and that no amount of money could affect the decision of the judges in the constitutional court. The judgement further shows that the court below observed that the second step was taken by the accused person himself, when he confronted Justice M.A Tembo. It is indicated in the judgement that Justice Tembo advised the accused that he was being scammed of the money since he, as one of the judges hearing the elections case, had never received any money from anyone and that he had never discussed with anyone about the money the accused was referring to.

As regards the third step, the court below indicated in the judgement that the applicant wanted to prove for himself by requesting that he meets Justice H.S.B Potani on the allegation that there was a parcel from somebody else to be given to Justice H.S.B Potani. The court below continued in its judgement to indicate that when contacted Justice Potani agreed to meet the accused in Blantyre. Thereafter, Judge Potani never picked the accused calls. However, it is on record that Justice Potani, the prime target of the gratification, flatly refused in cross examination discussing with the accused anything concerning money. He indicated that they just discussed about a parcel that could as well have contained bottles of water or face masks.

As put in the judgement of the court below, there were three circumstances or scenarios that the evidence presented. Thus, when one looks at the three incidents captured by the court below in its judgement as a whole, one gets the impression that there were various possibilities regarding the allegation that judges of the constitutional court were receiving money. The conclusion on the facts of this case do not lead to one inference and to one inference only. It leads to several inferences and indeed where several references are open some consistent with the innocence of the accused and other consistent with the guilt of the accused it is not open to a court in the absence of any other evidence to convict the accused.

The evidence as captured by the court is not working cumulatively in geometrical progression, eliminating other possibilities, that the accused is guilty. The evidence as captured and analysed in the judgment in the High Court is not leading to one reference only. It is leading to several inferences. The court below appears to be giving three scenarios of what happened. It would appear that, subject to what this Court might find on appeal, it was not open to the court to convict. There are therefore reasonable prospects that the applicant is likely to be successful on appeal. It again appears that prima facie, from the totality of the circumstances of this case, the appeal is likely to be successful on account of some substantial point of law to be argued respecting the founding a conviction on circmstaial evidence. There are therefore exceptional and special circumstances existing in this case that show that the interest of justice will better be served by releasing the Appellant on bail pending the hearing and determination of the appeal.

Interjections and intimidation of the accused and his counsel during trial

It is the contention of the Appellant that there was a mistrial in the proceedings before the court below. The Appellant submits that during the trial there were incidents which affected a right to a fair trial. As examples, the Appellant listed the following as being notable examples: that the trial court persistently interjected during cross examination therefore affecting the Applicant's right to challenge evidence; that the trial court refused to recuse itself when there was a prima facie case that the court would be biased in the circumstances; that part of the trial was conducted via video conference contrary to the law; that the court threatened the applicant that the court would send him to jail if the court perceived any delays on the part of the defence as a result of which the Appellant and his counsel were in perpetual fear of a possible revocation of bail if the court at any point thought that the Appellant was delaying the case. It was therefore the submission of the Appellant's counsel that, from the procedural perspective, the trial was marred with incurable injustices. Counsel further argued that in an adversarial system, the Court is a neutral player and let the parties fight it out. It lets a party litigate its case and follow its own theory of prosecution or defence freely and without reprisals or threats of the same. Thus, it is further submitted, where the Court is not seen to portray itself as neutral third party, the result is a mistrial as the Court's final verdict – acquittal or conviction – lacks legitimacy. For justice must not only be seen to be done. It must manifestly be seen to be done. This Court notes that the Appellant put before it partial

audio recordings of the trial to show that the court below wrongfully and unreasonably kept interjecting while the Appellant's Counsel were cross-examining state witnesses. Further, it is deponed by the Appellant that the conduct of the court below by wrongfully and unreasonably interjecting while the accused's Legal Practitioners were cross-examining state witnesses was unconstitutional, unlawful and therefore void for infringing on the Accused's right to a fair trial before an independent and impartial court. It is contended that the interjections by the judge demonstrate that the accused and his Lawyers were put under extremely intimidation during trial. The Appellant further states that the court had indicated to the accused and his counsel that if they conduct themselves in such a way that the court feels they are delaying the proceedings it would revoke bail. It is said that in fact the court revoked the bail at one point when the accused requested for time to engage the prosecution in plea bargaining. Thus, this left the Appellant and his defence team in a situation where they could not freely conduct their defence as they feared the judge would revoke their clients bail. They add that the defence were not sure when the Judge would feel they are delaying the proceedings. It is said that the defence refrained from raising objections during the trial in some circumstances for fear that the trial judge would feel that they were delaying trial. Further, the Appellant asserted that, at the time the charge was read over to him, he requested the court to allow him consult his lawyers but his request was turned down. This Court finds that if at hearing of the appeal the Appellant successfully established that the court below denied this consultation with his Legal Practitioners, it will mean that the court's denial of the Appellant's right to consult confidentially with a legal practitioner was seriously prejudiced the Appellant's right to a fair trial[42]. As this Court understands it, the right to a fair trial in the section 42 (2) (f)(iv) of the Constitution is not only restricted to the right to adduce evidence. It also extends to the right to challenge evidence. Thus, where a criminal defendant embarks on his right to challenge the evidence of the witnesses but meets unjustifiable interjections by the court that would amount to an infringement of his rights to a fair trial which might lead to an order of a retrial on appeal[43]. There is no denying of the fact that at law the duty of a judge is to be an impartial referee and undue interjections and interruptions might affect or disturb the sequence of the examination of

[42] See section 42 (1) (c) of the Constitution

[43] See *Saukila v National Insurance Company* [1999] MLR 362 (SCA); see also *Willias Daudi v The Republic and Legal Aid Bureau*: Constitutional Case No. 1 of 2018

the witnesses[44]. Further, undue interjections by the court in cross-examination by the accused may amount to a breach of the constitutional right to a fair trial. Breach of a constitutional right to a fair trial under section 42 (2) (f) (iv) of the Constitution attracts a right to an effective remedy under section 41(3) of the Constitution if the accused complains. The effective remedy could include ordering a retrial[45]. It is the view of this Court that if at the hearing of the appeal it is accepted that the played audio recordings as part of the record they would lead to any reasonable litigant to think that the Appellant might not have had a fair trial. In ***Willias Daudi v The Republic and Legal Aid Bureau*** (supra) the court instructively put it thus:

> "As was observed by the late Manyungwa J in *G.L. Chirwa v Attorney General* [2006] MLR 175 (HC) it cannot be doubted that under section 46 of the Constitution, the court has power to make such orders as are necessary where it is shown that a right or freedom has been unlawfully denied or violated. By virtue of section 41 of the Constitution, the Applicant has the right to an effective remedy from this court for the violation of his right. The question that has greatly vexed my mind is what remedy would effectively address the violation of the Applicant's right to be informed of the right to legal representation. As indicated, the Applicant was charged with the offence of armed robbery. The violation of his right to be informed that he had the right to legal representation in the trial proceedings does not extinguish the charge. **However, in my considered view, the violation of his right rendered the proceedings unfair. His conviction and sentence were therefore tainted with the unfairness and should therefore not be allowed to stand. Considering the peculiar circumstances of this present case, I am of the considered view that an effective remedy is a re-trial.** I therefore set aside the conviction and sentence and order a retrial before the Lower court." (Emphasis supplied by me)

The observations of the judge in the dicta above represents the position at law. This Court adopts exposition of the law by the judge in ***Willias Daudi v The Republic and Legal Aid Bureau*** (supra). As it were, where there is a constitutional breach of the right to the fair trial the proceeding themselves become unfair. Thus, to address the unfairness a retrial ought to be ordered. In the event of an order for a retrial, the trial by the court below will be deemed to be a nullity. The trial

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[44] Ibid.

[45] *Willias Daudi v The Republic and Legal Aid Bureau*: Constitutional Case No. 1 of 2018

will have to take place again before the High Court. Now, if the audio clips are anything to go by and are accepted at the hearing of the appeal as part of the record of appeal, a retrial might be ordered. Thus, the interest of justice would require that the applicant be released on bail pending the hearing and determination of the appeal to avoid a scenario where he would have served a sentence which he should not have ordinarily served.

Appellant's Poor Health

The Appellant contends that he is experiencing poor health in prison. He has tendered Medical Reports to buttress this contention. As it were, the position before this Court is that the Appellant, through a Medical Doctor who attended to him, averred to certain facts under oath in an affidavit. Further, the applicant has also filed a supplementary sworn statement by Dr. Patrick D. Kamalo in this Court. The Respondent is of the view that a health concern on its own cannot be regarded as an exceptional circumstance as the Applicant at the moment is in good health as indicated in the medical reports he exhibited in support of his application. It is well to put it record that on 5 January, 2022, Dr Patrick D. Kamalo put it in evidence Medical Reports which gave a Medical Diagnosis and Observations of the Appellant. The Medical Reports issued by Dr. Patrick D. Kamalo raised five (5) factors that have not been negated by the Respondent in response by way of another Medical Report or through cross examination. There was an attempt to dismiss the reports as having been made pre-conviction and that Dr Patrick D. Kamalo did not recently examine the Appellant. As the Court sees it, the approach by the Respondent was casual and lacklustre. One would have thought that the Respondents would have called for Dr Patrick D. Kamalo to be cross-examined on his affidavits or offer alternative medical evidence. The Respondents chose to kind of offer evidence from the bar which at law is not accepted. It is this Court's understanding of the law that failure to file a Replying Affidavit can only mean that those facts are admitted[46]. Further, the position at law is that evidence of poor health of the accused can

[46] *Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR*

Peter O. Nyakundi & 68 others v Principal Secreary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR

Phillip Tirop Kitur v Attorney General [2018] eKLR,

constitute a special circumstance[47]. The rationale for this is that the interests of justice require that a convicted person in bad health but awaiting the hearing and determination of an appeal ought to be released on bail so that he is able to attend to his medical conditions with a view that in the event of the appeal not succeeding he is able to resume his sentence. In the absence of any evidence to controvert what Dr. Patrick D. Kamalo put in evidence, the interest of justice would fall in favour of granting bail to the Appellant.

CONCLUSION

This Court find and concludes that the above factors, severally and collectively, constitute exceptional and unusual circumstances. These factors make this Court deem it fit to release the Appellant on bail pending the hearing and determination of appeal pursuant section 24 of the Supreme Court of Appeal Act. On the part of this Court and in the interest of justice as well as for the protection of the Appellant's rights as envisaged in Section 42 of the Constitution of Malawi, this Court allows the application for bail pending the hearing and determination of the appeal. The Appellant will thus be released on bail pending the hearing and determination of his appeal on signing a bond with the State on the terms as they were imposed in the court below and the following further terms and conditions: -

1. The Appellant will attend the hearing of the appeal and in default the bail herein granted will be liable for cancellation.

2. The appeal will be fast tracked for determination at an early date.

3. As this is a criminal matter, there will be no order as to costs.

The long and short of it is that in the view of this Court, when one takes all relevant factors into account, the applicants has discharged the onus upon him to prove exceptional and unusual circumstances which entitles him to be admitted to bail pending appeal.

Pronounced in Chambers the 4th day of February, 2022 at Blantyre, in the Republic of Malawi.

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[47] See *Mwawa v The Republic* and *Pandirker v Rep [1971 - 72] ALR Mal 204*

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HONOURABLE JUSTICE F.E. KAPANDA SC, JA