



IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CRIMINAL DIVISION



MISCELLANEOUS CRIMINAL APPLICATION NO.38 OF 2016

BETWEEN:

FRANK KANYENGA

-V-

THE REPUBLIC

**Coram: Hon. Justice M L Kamwambe**

Mr Maele of counsel for the Applicant

Mr Banda of counsel for the State

Mr Amosi ...Court Interpreter

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**RULING**

***Kamwambe J***

This is an application for bail. The Applicant was convicted of burglary and theft and sentenced to 5 years and 2 years concurrent sentences of imprisonment. He has been in custody now for 30 months. The lower court file is missing as such this matter has failed to be reviewed within 2 years as required by section 15 of the Criminal Procedure and Evidence Code. The matter was then before the Senior Resident Magistrate.



Both counsel agree that since the court record is missing at no fault of the Applicant and that under section 107 of the Prison Act the Applicant is entitled to one third remission to his sentence, which means he would serve only 40 months imprisonment sentence, he should be granted a normal sentence for burglary of 48 months imprisonment.

I have read the case of **Mike Banda and Davie Zembere -v- Republic** MSCA Criminal Appeal No. 6 of 2015 which upholds and quotes the case of **khoswe and others -v- The Republic**, Bail Application No. 54 of 2013 where justice Mwaungulu said:

*"The section does not suggest that the officer in charge must treat the sentence as two years, one year or six months 'if there is no confirmation by the High Court; rather the officer in charge must treat the sentence as two years 'until' there is confirmation by the High Court."*

The clarification in the above case makes grammatical sense but one may wish to ask what would be the consequence of the second limb of the quote where no confirmation has been had after the expiration of two years. What is the officer -in- charge supposed to do? In my view, without disagreeing with the two cases cited above, if the officer in-charge is complying with the language used, he will treat the sentence as two years and after the period stated expires, release the Applicant, not of course because there is no confirmation by the High Court, but waiting for the confirmation of the High Court (until there is confirmation by the High Court). As such, one would be released pending confirmation by the High Court. In this regard, I am prompted to release the Applicant. However, I do not subscribe to the idea that one may be released accordingly and upon confirmation be re- arrested or invited to complete his sentence. It looks absurd.

Exhibited is a warrant of commitment which orders the officer-in-charge to release the Applicant at the expiration of two years unless confirmation of sentence shall sooner be communicated to

him. The Officer-in –Charge must comply with the court order which means after two years he should release the Applicant. I therefore order that the Applicant be released accordingly.

**Made in Chambers this 3<sup>rd</sup> day of November, 2016 at Chichiri, Blantyre.**



M L Kamwambe

**JUDGE**