IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
MISC. CRIMINAL APPLICATION NO 47 OF 2005
BETWEEN

ANTONY PENAMA…….. APPELLANT

-and-

THE STATE ……RESPONDENT

CORAM MRS I.C. KAMANGA, J.

Theu; Counsel for the Applicant
Santhe; Counsel for the State
L.N. Msiska; Court Interpreter

R U L I N G

This matter came before this court by way of motion. It originated from the Chief Resident Magistrate Court where the applicant has been appearing before court charged with the offence of theft by servant. He is alleged to have stolen some millions of kwachas from his employer. The matter has not yet been concluded.

The peculiar history of the matter in the magistrate court is that the applicant was arrested on 1st March 2001 upon being suspected that he stole some money from his employer MANICA. He was released on police bail on 5th March 2001. Then he was rearrested on 4th April 2001. He appeared before the magistrate court on 4th April 2001 where he was charged with the offence of theft by servant. He denied the charge. In denying the charge he qualified the denial. It appeared to the presiding magistrate that the applicant did not seem to deny the fact that he was involved in any wrong doing but that there was need for verification of the exact figure. So on his application for bail, the magistrate was reluctant to grant him bail considering that the amount alleged was huge. The magistrate gave the prosecution a week to complete investigations and that at expiry of the week, the applicant should be granted bail.

The court sat a week later, and bail was granted to the applicant. Two sureties were bonded. The case was called for hearing again on 24th May 2001. On this date, there was no prosecution as prosecutor; Mr Chigwenembe advised the court that

the police were still investigating the matter. It was set down for hearing on 16th July 2001, on which date it was not heard. It was adjourned to 23rd July 2001 when the State sought an adjournment so that documents could be served on the defence as at that time defence had not been served with any documents that the State intended to use during the trial. So the matter was adjourned to 31st July 2001. Plea was taken on 31st July 2001 at which the applicant pleaded not guilty. The matter was adjourned to 31st August 2001 for trial. Two State witnesses testified on 31st August 2001 and the matter was adjourned to 30 to 31st October 2001. It was not heard. No reasons for failure of court sitting appears on record. Thereafter, the applicant applied to court to discharge one of his sureties as the surety wanted to dispose of some of this assets. The application was set down for hearing on 3rd May 2002 on which day both the applicant and his counsel as well as the prosecution were absent. So the court dismissed the application for non-attendance. The application was restored on 21st May 2002 and the surety was discharged. A new surety was examined and replaced the discharged surety on 22nd May 2002. The matter was set down for hearing on 28th May 2002. It was not heard on the scheduled day. No

reasons for failure of hearing appears on record. The court set the matter down for hearing once more on 3rd June 2002. Notices of hearing were sent to both prosecution and applicants counsel. On the scheduled day, the applicant as well as his counsel were absent. The prosecutor, Mr Chigwenembe was also not present in court. He had however sent his representative to seek an adjournment on his behalf as he was engaged on other duties. The matter was adjourned to 16th July 2002. On this day, all parties were present and the third State witness testified. The matter was specifically adjourned to 4th and 5th September 2002. It was not heard on both days. No reasons for court's failure to convene are available on the court record. The court set down the matter for hearing on 2nd October 2002. On this day, the applicant and his counsel were present but the assigned prosecutor for the matter was once more engaged on other duties and the State was seeking an adjournment. It was adjourned to 15th November 2002. On the said date prosecution was absent but the applicant and his counsel were present. The matter was set down for hearing on 3rd December 2002 at which date prosecution was once more absent. The applicant and his counsel were however present. Counsel for the applicant expressed concern on the

dragging of the matter at the prosecution's instance. In an attempt to move the State to give utmost attention to the matter the court discharged the applicant and at the same time invited the State to apply for a reinstatement. On 9th December 2002 the State appeared before court and applied for reinstatement. Upon being satisfied with the State's explanation on cause of failure to prosecute on the previous dates that the matter had been set down for hearing, the matter was restored and was set down for mention on 19th December 2002. On 19th December, the applicant was present in court but his counsel as well as the prosecutor were absent. The matter was set down for another mention on 30th December 2002. On this day, all parties were present in court and the matter was set down for hearing on 20th January 2003. All parties never appeared before court on the scheduled day. The court on that day adjourned the matter to 13th February 2003. The court also cautioned the applicant that if he continued to fail to present himself before court his bail would be revoked. The matter was not heard on 13th November 2003. No reasons for court's failure to convene appears on record. On 26th February, 2003, the applicant applied to court for release of a blue book for a motor vehicle as the same was

required at the Road Traffic Department. The blue book was released and no date for hearing was set down. On 10th June 2003 the court convened and four State witnesses testified. The matter was adjourned to 15th July 2003 on which date one State witness testified. This witness testified for two days and the matter was adjourned to 1st August 2003. The court did not convene on this day and reasons for failure to convene do not appear on record. The matter was once more set down for trial on 15th September 2003. None of the parties appeared before court. The court proceeded to dismiss the case for prosecution's failure to prosecute. At the same time the court issued a Warrant of Arrest against the applicant for the applicant to show cause for his failure to attend court. It appears from the record at this particular time, counsel for the applicant, Mr Nyirongo had left the country for further studies. On 9th October 2003, the prosecution applied to restore the case and Mr Theu took over as defence counsel for the applicant. Mr Theu advised the court that as he had just taken the matter, he was not ready for a hearing. He thereby sought on adjournment to another date to enable him to prepare for the case and to go through the court record. The matter was adjourned to 11th November

2003 for hearing. It was not heard until 7th April 2004 when the nineth State witness testified. After the examination in chief, Mr Theu sought an adjournment so that he could meaningfully cross-examine the witness. The matter was adjourned to 5th May 2004 and the accused was to be on bail. The court resumed sitting on 16th September 2004. It appears from the court record that when the court convened on this day, the court file could not be found. So the court ordered that a temporary file should be opened. It also appears that the applicant's counsel applied to court that he was not ready to proceed with the matter since the court file was missing. The court, however, overruled counsel Theu's application for adjournment and advised Mr Theu that the court would proceed with the temporary file. At the end of the day, prosecution concluded its case and the court found that a prima facie case had been made against the applicant. The court was informed that the accused was going to exercise his right to remain silent. Applicant's counsel further informed court that defence was not ready to proceed at that particular period in time. The matter was therefore adjourned to 6th October 2004 with the court's order that as defence had been served with all copies of all exhibits, the defence

would not have any problems in presenting their case.

On 6th October 2004, the court convened and the applicants counsel sought on adjournment. The basis of the adjournment was that the court record was being typed and the same was not yet finished. So the matter was adjourned to 15th October 2004 for continued hearing. On 15th October 2004 there was a typed record of the proceedings in court. The applicant was examined in chief as the first defence witness. As the matter was about to proceed to cross examination, defence counsel sought an adjournment because he had a health problem, [he had a running stomach] so the matter was adjourned to 18th October 2004, the applicant and his counsel were present in court. However, prosecution was not available as had been assigned to other duties. The matter was adjourned to 15th November 2004. The court record is silent on what happened on this day.

The matter came before court again on 10th March 2005. Now the presiding magistrate was a new Chief Resident Magistrate. When the matter was called to order, counsel for the applicant addressed the court. He advised the court that he would like to

review certain crucial documents which were in the State's possession if possible. And that if the documents were not available, he would like their absence to be explained. He advised the court that his application was being made under Section 37 of the Constitution and that these documents are crucial for the defendant's right to defend himself. Prosecution enlightened the court that the documents that he was seeking were those that had been tendered in court and of which the applicant had been served. Finally counsel for applicant sought an adjournment on the matter.

The court proceeded by requesting counsel for the applicant to supply the court with the necessary information to enable the court to make an order to have the documents sent or brought before court. The court further advised counsel for the applicant to supply the information to court by the noon time of 11th of March 2005. The matter was adjourned to 27th-29th of April 2005.

On 28th April 2005 the court was set for trial. Counsel for the applicant addressed the court. He stated that the matter had previously been adjourned so that he could get material that he needed to proceed with examination in chief. He

said that he had failed to bring the information in good time because his cousin had passed away. It should be mentioned that at this time three weeks had passed since the day that the court had ordered counsel to provide the information.

At this point the court noted that the matter had been with defence from September 2004 and that defence had began examining its witness in October 2004. Now for counsel to come to the point at this time seeking documents, when it was way past anytime of discovery was giving the court the impression that counsel for the applicant was not well prepared for court. The court noted that it was not in the interest of counsel's client to have to wait too long for conclusion of a case as has happened in this particular case. The court noted that the delay in the matter was unjustified and for that purpose, the court revoked the applicant bail and ordered that the applicant be remanded in custody until such time as his sureties would be present so that the court could reconsider bail. The matter was hence adjourned to 9th May 2005 for hearing. On 9th May 2005, counsel for the applicant advised court that the documents that he was seeking had not yet been forwarded to court by the complainant. At which point it transpired that

the complainant had written to the court with copies to prosecution and applicant's counsel advising that the documents that counsel was seeking had been tendered in court during prosecution's testimony. The court noted that the applicant had not brought his sureties for examination and ordered that the applicant should remain in custody.

This moved counsel for the applicant to move this court on an application for direction that the applicant be released on bail and/or that an order be made that the order of the court below revoking the applicant's bail on 28th April 2005 and declining to vary or suspend the same on 9th May 2005 be varied and /or suspended on the grounds that the applicant was not in breach of bail conditions. That failure by the defence to proceed with the hearing on 28th and 29th April was not deliberate and that the circumstances and manner of proceedings of the lower court on 28th April 2005 and 9th May 2005 are prejudicial to the applicant.

I have laboured to go through the court proceedings from the date of commencement to the point in time when the lower court revoked the applicant's bail

for one reason – to show that there is inordinate delay in this matter. That the contributors of the inordinate delay are the prosecution, defence counsel and to a certain extent the court itself. That much as all parties in this case have contributed to the delay, counsel for the applicant has been the major contributor for the delay from the period that the matter came up for defence. And the delay occasioned by counsel at this particular time is unjustified.

This matter has been in the system for a period of more than two years. From the period that the former counsel for the applicant stopped representing the applicant, the reasons that counsel who took over proceedings advanced to court for adjournments have in some of the instances indicated that he is not seriously considering winding up the defence case. Instances include the misrepresentation by counsel to court of the background of the matter when a new presiding magistrate look over. At this point in time, much as counsel was aware that a temporary file had been opened based on the notes which had actually been typed at counsel's instance before the file went missing, and much as counsel had been provided with all copies of the exhibits that were tendered

in court, counsel pretended to court that he did not have a copy of the court record in his custody. He also presented himself to court as not having copies of all the exhibits that prosecution had used in this matter. He also forgot to advise court that the former presiding magistrate had ordered that counsel should proceed with defence because counsel had the requisite materials at his disposal in the form of copies of all the exhibits that had been tendered as well as a typed version of the court record. What counsel did not take into consideration when he was addressing the new presiding magistrate was the fact that there is a record of all proceedings that have been undertaken in this case. The magistrate taking over proceedings must have gone through the record to converse with the matter. As an officer of the court, counsel was under an obligation to provide the court with a true representation of the facts of the matter. Instead, for reasons for which only counsel is versed with, he proceeded to lay before the court like he did not know the background of the matter. He also presented matters in court like if the documents that he was seeking could not be produced by the state, it would not be possible for him to proceed with the matter. Yet the chronology of events in this

matter indicates that if the court file went missing at all, then it did miss after counsel had typed the whole record as it was at that time. Infact counsel had a copy of the typed version of the court record. The conduct of counsel at this point in time when he addressed court and sought adjournment on basis that he had no documents on which he could examine his witness was not in line with his office's responsibilities. For counsel's first and foremost obligation is to the court. To ensure that justice is done. Secondly his obligation is to his client – to ensure that justice is done.

Inordinate delay negates the mandates of justice. This is especially so in criminal justice for our Constitution stipulates that every person accused of an offence shall have a right to trial within a reasonable time after having been charged – Section 42(2)(f)(1) of the Constitution. The reasonable time in this provision ends at conclusion of the hearing. In other words, it goes all the way to the time when the court will find the person either guilty or not guilty. If found guilty, it end s with sentence. The reasonable time does not end when the State closes its case. Under this section counsel is equally under a duty to ensure

that there is speedy trial when the matter is for defence. The excuse that counsel has laid before this court that he was not able to provide the information required because he had been bereaved needs some scrutiny. Much as I sympathize with counsel for losing a dearly beloved cousin, There is a gap of three weeks from the time of the order to the next court sitting. And in all these twenty-one days, counsel never provided the required information. Counsel's basis for failure to provide the information is therefore wanting if you put it into context. This is because at the time of the next date of hearing, information was still not available to court to assist court to make the requisite summons.

Counsel has submitted that there is no justification for the revocation of bail. Section 42(2)(e) of the Constitution provides that every person arrested for, or accused of, the alleged commission of an offence shall have the right to be released from detention with or without bail unless the interests of justice require otherwise.
Part II of the Bail Guidelines Act deals with consideration of bail by the court. Section 1 of the said provision states that a person arrested for the alleged commission of an offence is

entitled to be released with or without bail at any stage preceding his conviction in respect of the offence, unless the court finds that it is in the interest of justice that be detained in custody. Section 4 outlines the principles which the court should take into consideration in deciding whether or not bail should be granted. Under 4(x) the court has to take into account any other factor which in its opinion should be considered. [if the same is in the interest of justice]. This matter is a 2001 matter. It has not yet been concluded. The contributors to the delay include the court itself, the state as well as the defence. From September 2004, the greatest contributor to the delay is the applicant himself. I am saying that it is the applicant himself because it is the person who is representing him who is contributing to the delay by playing delaying tactics. It is in the interest of the applicant that the matter be concluded. It is equally in the interest of the State that the matter should be concluded. It is in the interest of justice that this matter should get out of the court system before the year ends. Many are the times that courts have been blamed for delay in concluding matters once they are registered in our courts. The matter at hand is another example where counsel has contributed to

the delay of a matter in court. The interest of justice requires that this matter should be concluded as soon as possible. In revoking bail, the court took into consideration the delay that is being experienced at the applicants instance. And the only option available for court to move the applicant to deal with his defence expeditiously was to revoke the bail. It should be remembered that at the time that the bail was granted, the court had taken into consideration the gravity of the offence and other circumstances surrounding the matter and reluctantly granted the bail. It should also be observed that at this point in time, the applicant has a case to answer. Much as an accused is innocent until proven guilty, the interest of justice require that the court should be sensitive to the proceedings as the case progresses in court. That is why after bail is granted by court, the court can at anytime revoke the bail if the interests of justice so require. In the matter at hand, conclusion of the case so that both the State and the appellant should be clear of their fate is of essence. In the circumstances, there is no reason for me to tamper with the lower court’s decision to revoke bail.

Let me urge counsel for the applicant to stop prevaricating and assist his client by ensuring that the matter is heard when it is set down for hearing. Counsel is under a duty to ensure that his client's interests are taken care of. His client's interests in this matter are a speedy hearing. This is long overdue. Unjustified excuses, including that counsel is appearing at the High Court when he is not so appearing in the High Court are not in his client's interest. Neither are they in the court's interest. As an officer of the court, counsel should also assist the court in ensuring that the matter is concluded.

All being said, the application to revoke or vary the lowers courts decision in revoking the applicant's bail is hereby dismissed.

MADE in Chambers this 27th day of June 2005.

I.C. Kamanga (Mrs)

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