



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
BAIL APPLICATION NO. 27 OF 2016**

GRESHAN SESANI.APPLICANT

-v-

ATTORNEY GENERAL.1st RESPONDENT

And

THE OFFICER-IN-CHARGE CHICHIRI PRISON.....2nd RESPONDENT

Coram: Hon. Justice M L Kamwambe

Goba Chipeta for the Applicant

Salamba of counsel for the Respondent

Phiri ...Official Interpreter

RULING

Kamwambe J

This is a motion for writ of habeas corpus taken under section 16 (6) (a) (ii) of the Statute Law (Miscellaneous Provisions) Act and

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of the Rules of the Supreme Court 1965. The motion seeks this officer-in-Charge of Chichiri; Prison to show cause why the convict immediately. The matter came inter partes. By order of this court, the Attorney General is included as 1st Respondent.

In Criminal Case No. 200 of 2010 the Applicant was convicted by the Blantyre magistrate court of offences of burglary and theft and was respectively

sentenced to 8 years and 2 years imprisonment respectively, to run concurrently. On confirmation of the sentences by the High Court, it was ordered, on the 23rd October, 2015 that he be released from custody, unless he is being held for other lawful reasons. The Release Order shows that the Prison Officer-in-Charge was served with the order on 13th January, 2016. I condemn this delay in releasing the Applicant or notifying the Prison authorities months after.

In Criminal Case No. 166 of 2011 the Applicant was convicted by the South Lunzu First Grade Magistrate Court of the offence of robbery and was sentenced to 10 years IHL. The warrant of commitment was exhibited. The wording of the warrant of commitment was to the effect that ' the Respondent release the Applicant at the expiration of 1 year, unless confirmation of the 10 years' sentence should sooner be communicated to the Respondent by the High Court'. The Warrant of Commitment was dated 10th May, 2011. To date the High Court has not communicated to the 2nd Respondent. The lower court's record is missing and therefore the High Court cannot review or confirm the matter.

Section 16 (6) (a) (ii) of the Statute Law (Miscellaneous Provisions) Act states that the High Court may whenever it thinks fit direct 'that any person illegally or improperly detained in public or private custody within such limits be set at liberty'. The illegality or impropriety of the Applicant's detention arises from the Chichiri

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Prison Officer-in-Charge failure to release the Applicant in compliance with section 15 (5) of the Criminal Procedure and Evidence Code. This section requires that the Applicant be confirmed before the expiry of 1 year, and if not, the Applicant be released by the prison officers if not communicated. There is no proof that the Prison Authorities were notified by the High Court of confirmation or review of the sentence and conviction. I called for the lower court record for confirmation but the Chief Resident Magistrate responded that the record was burnt together with other files at the South Lunzu Court which was set on fire by an angry mob on 3rd February, 2016. One wonders why it took so long (about 5 years) to send the record to the High Court, until it got burnt. There is no justification for this.

The State agrees that there has been no confirmation by the High Court now over 5 years, and that the lower court record got burnt in a fire caused maliciously by other people. I do not understand why the State says the Prison authorities are not responsible for keeping the Applicant for more than a year in custody without order of confirmation. Just because the judiciary is trying to reconstruct all cases damaged by fire and that the Applicant failed to trigger the process of confirmation do not justify the apparent breach. The Applicant is not responsible for triggering the process of confirmation and what he did to come now is not by any law time barred as he is merely exercising his right to be set free since his incarceration is unlawful from one day after the 1 year of receiving the Warrant of Commitment. That the Director of Public Prosecutions should have been the Respondent rather than the Attorney General is a mere technicality which would not nullify these proceedings but just delay them and

perpetuate the unlawful incarceration.

The order of the South Lunzu Magistrate Court through the Warrant of commitment to the prison authorities is very clear and non-compliance will make them responsible for unlawful detention.

It does not matter that the lower court erred for not remitting the file to the High Court. As such, I order that the Applicant be set free forthwith.

Made in Chambers this 24th day of October, 2016 at Chichiri, Blantyre.

A handwritten signature in blue ink, appearing to read 'M.L. Kamwambe', written in a cursive style.

M.L. Kamwambe
JUDGE