



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION**

CRIMINAL APPEAL NO. 32 OF 2018

DYSON NZERU

V

THE REPUBLIC

Coram: Hon. Justice M L Kamwambe

Chitsime of counsel for the State

Jumbe of counsel for the Applicant

Amos...Official Interpreter

BAIL RULING

Kamwambe J

This is an application for bail pending appeal taken under section 355 (1) of the Criminal Procedure and Evidence Code. The Applicant was convicted of the offence of defilement under section 138 of the Penal Code and was sentenced to 5 years imprisonment. The victim girl child was 5 years old. He appealed on the ground that the appeal is likely to succeed.

The law on bail pending appeal has not changed for a long time. Application for bail pending appeal differs from application for bail before trial or conviction in that in the latter, one is presumed innocent, while in the former, one is a convict as such only in

exceptional and rare circumstances would one be granted bail. The case of **Suleman v Rep [2004] MLR 398 (MSCA)** stands in support of the long standing principle that bail pending appeal can be granted only on existence of "exceptional and unusual circumstances." Later, the cases of **McDonald Kumwembe and others v The Republic, MSCA Criminal Appeal No. 5A and 5B of 2017** and **Letasi v The Republic Criminal Appeal No. 13 of 2016** developed another principle emphasising on the principle of "interest of justice" as provided for in section 42(2) (e) of the Constitution. Then came the case of **Joseph Kapinga and Annie Kapinga v The Republic, Criminal Appeal No. 16 of 2017** which seemingly overruled the **McDonald Kumwembe and Joseph Kapinga cases** (supra). I would support the old school of thought on the reason that section 42(2) (e) refers to rights of arrested persons or persons accused of an offence contrary to what section 42 (1) which refers to detained persons including sentenced persons which obviously means convicted persons. As such, convicted and sentenced persons would not fall under section 42 (2) (e) which provides as follows for ease of comprehension:

"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-

to be released from detention, with or without bail unless the interests of justice require otherwise."

To include sentenced persons in the above section would bring confusion which was not intended by the legislature. The separation made between this section and section 42 (1) of the Constitution was deliberate to differentiate bail dealings with accused persons pending trial and sentenced persons pending appeal. This is why 'sentenced persons' are not included in section 42 (2) of the Constitution. There is thus no legal basis for applying the principle of interests of justice to sentenced persons and more likely convicted persons. Without labouring to produce many words to justify the old school of thought, I hope the explanation above is clear and acceptable to our legal minds.

As per the case of **Vincent Kusowa v Rep MSCA Criminal Appeal No. 9 of 2015**, the question to ask is whether the applicant's case is so exceptional and unusual that having regard to all circumstances surrounding it, the court will be justified in making an order that he be released until his appeal has been determined. In such situations of bail pending appeal, court's exercise of their discretionary powers which are repressed in that it is less free to grant bail than where one applies for bail pending trial. The rules are now stricter and less accommodating because he has now lost his right to freedom by virtue of conviction and sentence.

The Malawi Supreme Court has invariably held that in making arguments for bail pending appeal, parties must show a prima facie case of likelihood of success while resisting the temptation to argue the substantive appeal case. A party must only show that the lower court decision was obviously wrong in the eyes of the court in that it is so obvious that a miscarriage of justice was occasioned and that it will not be proper to keep the appellant in custody pending his appeal as it is more likely that the appellate court will reverse the lower court's decision. This means that there is an obvious error by the lower court, such as, convicting on outright hearsay evidence or a defective plea of guilty. Bail may also be granted where it is shown that by the time the appeal is heard, the accused shall have served his/her imprisonment term.

The Applicant applies for bail on the basis of the principle of the 'interest of justice'. This is what Twea SC JA had to say in the **Joseph Kapinga and Annie Kapinga** case (supra) in support of the 'unusual and exceptional or special circumstances':

*"I have closely examined Mwaungulu SC JA EXPOSITION on bail pending appeal that it should be based on the 'interest of justice', than on "usual or special or exceptional circumstances", which he espouses in the case of **McDonald Kumwembe and others (supra)**. He is, in my view, ambivalent on this issue. He acknowledges that the court, when considering bail pending appeal, is not, in fact, disposing of the appeal. Be this as it may, the Court will have to address its mind, among other things, to the grounds of appeal, the strength of the evidence and likelihood of success. As the learned Judge said in the **McDonald Kumwembe's case (supra)** at page 6 of his ruling: "the correct focus for the Court*

is that justice may be achieved and injustice avoided when a court finally determines the appeal". I believe that his proposition is not any different from the approach that the courts have, all along, taken when evaluating "unusual or special or exceptional circumstances" on which they would "deem it fit" to release a convicted appellant on bail pending his appeal: that is that the court should aim at achieving justice and avoiding injustice to either of the parties at the time the appeal would be determined."

I am reluctant to accept that the appeal is likely to succeed on the face of it. The hearing of the appeal will be expedited so that the Applicant does not suffer any injustice. The lower court duly warned itself the danger of convicting the accused person on uncorroborated evidence. Age of the girl victim is not in dispute so too the element of penetration and the girl consistently mentioned the Applicant as the defiler. Bail pending appeal is thus denied. The appeal shall be heard on the 21st November, 2018 at 9.00 am.

Made in Chambers this 2nd day of November, 2018 at Chichiri, Blantyre



M L Kamwambe

JUDGE