



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
Criminal Appeal Case no. 31 of 2018**

MOREEN DICK.....APPLICANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: Hon. Justice M L Kamwambe

Salamba of counsel for the State

Bande of counsel for the Appellant

Amos...Official Interpreter

JUDGMENT

Kamwambe J

This is a summons for Stay of sentence and for bail pending appeal taken under section 355(1) of the Criminal Procedure and Evidence Code. The Applicant was convicted of the offence of failing to protect a child from exposure to physical and moral hazard under section 3 (b) (1) of the Child Care Protection and Justice Act of 2010. She was sentenced to 24 months imprisonment. The warrant of commitment also states as above. A Notice of appeal was duly filed on 28th March, 2018.

The lower court record shows that the Applicant was charged with and convicted of desertion of children contrary to section 164 as read with section 218 of the Penal Code. However, she was charged and convicted of the offence under section 3 (b) (1) of the CCP&JA as stated above. This section does not create an offence. In the fear that sorting out of the proper record may take some time, bail pending appeal was sought. It is not known when the appeal will be heard. The prosecutors at Ngabu police have confirmed that they did not prosecute the Appellant on the charge of desertion. The real record should be with the lower court. It cannot be understood what the lower court was trying to do. This conduct is preventing Applicant to enjoy the right to an effective remedy as espoused in section 42 (2) (b) (viii) of the Constitution.

Application for bail pending appeal under section 355 of the CP&EC has developed age long principles to consider when the court is exercising its discretionary powers. Practice shows that bail may be granted on existence of special and unusual or exceptional circumstances such as where the appeal is likely to be successful or where the appellant/ applicant will have served a full term by the time the appeal is decided (**Jonathan Mekiseni and others v The Republic** Criminal Appeal Cause No. 14 of 2015). In **Joseph Kapinga and Annie Kapinga v The Republic, MSCA Criminal Appeal No. 16 of 2017**, the Supreme Court held that a convict can only be released on bail pending appeal at the discretion of the court if it deems fit. The courts have developed the principle that this discretionary power should only be exercised where there are unusual and exceptional circumstances. This case was apparently overruling the newly developed approach of looking at the interest of justice as espoused in **McDonald Kumwembe and others v The Republic, MSCA Criminal Appeal Case No. 5A and 5B of 2017** and **Letasi v Republic MSCA** Criminal Appeal No. 13 of 2016. The Kapinga case was effectively adopting the decision in **Sulemani v Rep.** [2004] MLR 398. The preferred approach of Kumwembe case draws its justification from the reading of the law in section 42 (2) (e) of the Constitution which says that every arrested person shall have

the right to be released from detention, with or without bail unless the interests of justice requires otherwise. (My emphasis). If the interest of justice will operate to justify one to continue to be in custody, then we should look at the flip side where the interest of justice will require one to be released. So, this flip side will be advocating or referring to the unusual and special circumstances. All I am saying is that it does not matter which approach you make you will all reach the same destination. It is like a coin which has sides A and B. The value of the coin does not change by looking or facing one side or the other. Hence, it does not matter whether you approach it from the angle of 'interest of justice' or 'unusual and special circumstances'. The so called unusual circumstances will determine the interest of justice, such as, for example, likelihood that the appeal will be successful will make me consider it to be in the interest of justice to grant bail pending appeal. Principles are developed from the law as to how you want to apply the law. You are actually interpreting the law by developing principles. Therefore the argument that usual and exceptional circumstances are not in the law is not fair, because they do not need to be in the law since they are merely an aid to interpret the law.

I am aware that the interest of justice in the constitutional provision refers to interest of justice that justifies continued incarceration. The opposite should be true that there could be the interest of justice capable of justifying release of a detained person. However, the construction of the provision requires that the court does consider release unless the interest of justice requires otherwise.

In the present case, since the record shows that she was convicted of a non-existent offence and that the appeal if held is likely to be successful, it would be in the interest of justice to release her. It is an unusual and special circumstance that one faces one offence in court of which he is convicted and sentenced, only to have the record depict another offence on record altogether.

It baffles me how a wrong record happens to be before this court. I order that the Assistant Registrar do investigate the matter and file his report within three months so that the court is able to establish the way forward.

Made in open court this 11th day of September, 2018 at Chichiri, Blantyre.


M L Kamwambe
JUDGE