

**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CRIMINAL APPLICATION NO. 24 OF 2016**

BETWEEN

MERCY NTUMPANJE 1ST APPLICANT

HENRY BWANALI 2ND APPLICANT

AND

THE STATE RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Maele, of Counsel, for the Applicants

Mr. Salamba, Senior State Advocate, for the State

Mrs. Annie Mpasu, Court Clerk

ORDER

Kenyatta Nyirenda, J.

This is an application by the Applicants for an order acquitting them on account that the court record was destroyed by fire. The application is made under the Court’s inherent jurisdiction.

The application is supported by the following affidavit sworn by Mr. Fostino Yankho Maele wherein he depones as follows:

- “2. *The information contained in this affidavit has come to my knowledge from the Applicants herein and from the Applicants’ warrants of commitment to prison which I have personally perused and I verily believe to be true.*
- 3 *The Applicants herein are presently incarcerated at Chichiri Prison and they are unable to swear the affidavit.*

4. *The Applicant were convicted by the FGM Court sitting at Lunzu in criminal case number 303 of 2015 of the offence of Robbery Contrary to section 301 of the Penal Code*
5. *The warrant of commitment has been attached and marked as exhibit FM 1 and FM 2*
6. *The 1st Applicant who is aged 65 was sentenced to 5 years IHL.*
7. *The 2nd was sentenced to 12 years IHL*
8. *The warrants were signed on the 11th January, 2016*
9. *Three weeks after conviction and commitment to prison on the 3rd of February, 2016 the South Lunzu Magistrate was set ablaze by some angry Machinjiri resident and all the files which were at court were lost.*
10. *The fact that the files were lost clearly means the Applicants cannot appeal and neither can the High Court review the Applicants case.*
11. *The Supreme Court in the case of **Andrew Morris Chalera and 2 others MSCA Criminal Appeal No. 5 of 2012** other considered the procedure where the court file missing*
12. *The Supreme Court in its decision held that where a missing part of the record is substantial, material and consequential, such that proceeding with the appeal would result in justice, the conviction should be set aside without the full appeal being held.*
13. *After setting aside the conviction the court of appeal consider whether that should be the end of the matter or where the interest of justice so require, order a retrial.*
14. *In the case at hand there is all evidence that the record of the lower court was burnt during the fire.*
15. *The decision of the Supreme Court is to the effect that where the missing part of the record is substantial, material and consequential such that the proceeding with an appeal would result in justice, the conviction should be set aside without a full appeal being heard.*
16. *The Applicant's record was completely lost in the fire hence it is impossible to even hear the confirmation let alone a review.*
17. *In the premises and by authority of the decision of the Supreme Court, this court must quash the Applicants conviction herein and sentence must be set aside.*
18. *Upon quashing the conviction this court should consider whether to order a retrial or order an immediate release of the applicant.*

19. *The Applicants have served 6 months. The only appropriate order would be a retrial.*
20. *This court should however specifically consider that the 1st Applicant is aged 65 and even though she was convicted of this offence there are high chances that she did not commit the offence she was convicted of as it is highly unlikely that a 65 year old woman can commit robbery.*

WHEREFORE *in view of the foregoing premises, the Applicant prays that*

- (a) *Makes an order acquitting the Applicants from the offence of robbery which he was convicted of and sets aside the sentences of 5years and 12 years IHL respectively..*
- (b) *Orders that the Applicants be released on bail until such a time as the state might be ready to retry them.*
- (c) *This Court makes such other orders or directions as may be appropriate.”*

The State filed an affidavit in response sworn by Mr. Andrew Salamba wherein the State objects to the application. The State claims that there is no proof that the convicts' case files were burnt at the court premises. Mr. Salamba argued that that the Applicants cannot be acquitted when there is no proof as to the missing of the court files.

The question for determination is whether or not the Applicants should be acquitted and retried or acquitted without retrial on account of the missing trial records.

Counsel Maele submitted that the evidence in the present case is such that the Court should exercise its discretion in favour of making an order acquitting the Applicants and ordering a retrial, within a specified time. I deem it prudent to quote in full the arguments by Counsel Maele:

“4. **ARGUENDO**

- 4.1 *There is clear evidence that the Applicant's files were part of the files that were destroyed in a fire at South Lunzu Magistrate Court. There is therefore abundance of evidence that the Applicants' file cannot be availed at all.*
- 4.2 *The Constitution and even the Criminal Procedure and Evidence Code both guarantee the right to review or appeal to a higher court than a court of first instance. This is a right of paramount importance more especially in criminal matter.*

4.3 *The right to review under section 15 of the Criminal procedure and Evidence Code is a mandatory statutory duty of the High Court to review*

all sentences passed by subordinate courts. It is also a mandatory duty of all subordinate courts to forward the cases that they have done to the High Court for review.

4.4 *In this case on account of the files which were burnt, it is impossible for the High Court to review the files and furthermore it is impossible to contemplate the Applicant filing an Appeal. In this case it is the whole files that are unavailable. The only course therefore is to set aside the convictions and the sentence.*

4.5 *The next question to consider is whether this court should order an outright release of the Applicant or this court should order a retrial.*

4.6 *The Applicants have served barely six months of their sentences. The appropriate order would be to order a retrial."*

Counsel Maele placed reliance on the case of **Andrew Morris Chalera and 2 others, MSCA Criminal Appeal No. 5 of 2012 (unreported)** wherein the Supreme Court of Appeal discussed the procedure that has to be followed where the trial record is incomplete or missing. Counsel Maele drew the Court's attention to the following dicta which occurs at page 8:

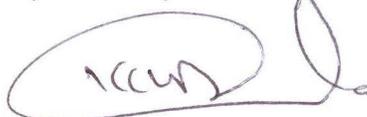
"what we make of the scanty precedent that we have been able to scout is that a court of appeal will weigh the degree, extent and relevance of the part of the record missing and cannot be reconstructed. Where the missing part of the record is not substantial, immaterial and inconsequential as would not result in a miscarriage of justice, the appeal shall proceed with and finally determined. Where the missing record is substantial material and consequential, such that proceeding with the Appeal would result in injustice, the conviction should be set aside without the full appeal being heard."

Where the conviction is set aside it behoves the court of appeal to consider whether that be the end of the matter or where the interests of justice so require, to order the Appellant to be retried. Whether an order for retrial should be made depends on the circumstances of each individual case".

This matter was heard on 9th June 2016. The Court took the view that the information regarding whether the case files were indeed burnt could be obtained through the office of the Registrar of the Court. A letter requesting such information was written on 10th December 2016. The said letter and subsequent reminders have not been answered. In the circumstances, the Court is left with the distinct view that the files were indeed burnt.

The Applicants have now served more than two years four months of their respective sentences. This fact tips the scales in favour of quashing the convictions against the Applicants and ordering their immediate release. It is so ordered.

Pronounced in Court this 18th day of May 2018 at Blantyre in the Republic of Malawi.

A handwritten signature in black ink, consisting of a large, stylized 'K' followed by a series of loops and a long horizontal stroke extending to the right.

Kenyatta Nyirenda
JUDGE