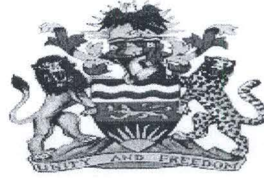

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Malawi Judiciary

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CRIMINAL APPEAL NO 16 OF 2017

BETWEEN:

JOSEPH KAPINGA AND ANNIE KAPINGA................................ APPELLANTS

-V-

THE REPUBLIC .... RESPONDENT

CORAM : THE HONOURABLE JUSTICE E B TWEA SC JA

COUNSEL FOR THE APPELLANT – Mrs Gloria Mbendera

COUNSEL FOR THE RESPONDENT – Absent

RECORDING OFFICER – C. Chimtande

RULING

TWEA SC JA

The applicants filed a summons for bail pending appeal on 20th November, 2017. It was supported by the affidavit of Mr Maele of Counsel. The gist of the application was that the proceedings, in this case, took place in prison and therefore they were null and void.

I have examined the affidavit of Mr Maele of Counsel for the applicants. I find that it is inaccurate and misleading. Certainly, he did not fully disclose what transpired in the proceedings in issue. Let me premise my observation by appreciating that the applicants changed lawyers several times, even in this Court. I would not wish to convey an impression that counsel was intentionally trying to mislead the Court. He may have, in his affidavit, relied on what he was told than the information on record.

Be this as it may, I wish to observe that the record is clear that the applicants appeared before the Acting Chief Resident Magistrate, sitting in Zomba, for plea on 27th March 2015. They were not represented. The case was adjourned. When the case was called in open court on 2nd April, 2015, they were represented by counsel. Proceedings continued in open court and witnesses were heard. However, in the course of the proceedings there arose issues about security. In its ruling of 15th May, 2015 the trial court said:-

> *"in this case, it is in the court's mind that the previous hearings have been characterized by rowdy audience purporting to follow the case. It came as no surprise when Counsel for the accused made an application requesting the case to be heard in another district. I took the liberty to reproduce part of the letter and it read as follows:*
>
> > *"We would like to request the court if the proceedings herein can be held in another district other than Zomba for the sake of the parties involved in this matter. Continuing hearing the proceedings herein at the Zomba Magistrates Court will occasion a failure of Justice. We shall proceed to represent our clients only if our security, security of our clients and the court is guaranteed."*
>
> *This request led to the hearing of this matter at prison premise in order to guarantee the security of all parties in this matter. This is why even today extra security has been requested at the Court premise to ensure that the accused persons attend proceedings without having concerns relating to their right of life. This has been done bearing in mind the tensions that arise more especially against the suspect by those who come to attend this matter. This Court observed and indeed noted with concern the conduct of the community when the accused was leaving the Court premises on 15th April 2015. This led to the involvement of extra police officers when the accused persons in order to ensure that mob justice has been avoided."*

Counsel, in his affidavit, did not refer to the security issues that were raised with the Court, the request to transfer the case to another district or the ultimatum that the lawyers would only continue to represent their clients if their security was guaranteed. Further, counsel omitted to point out that the transfer of the sitting to prison premises was as a result of that request. He did not disclose that the case was subsequently transferred back, for further hearing, to the court premises. The impression created, by

the affidavit of counsel, that the proceedings were wholly held in prison is therefore not correct.

This application, although not specifically cited, was brought under section 24 of the Supreme Court of Appeal Act. It is trite that this Court has the power to grant bail pending appeal where "it deems it fit". I have read the skeleton arguments of both the applicants and the State. Unfortunately the arguments are based on the incorrect impression created by the applicants that the proceedings were held in prison therefore they are null and void. The arguments therefore are, in my view, irrelevant and immaterial. This go for the cases cited too. These are the cases of **Towera Chitsa and Kelvin Chitsa vs Rep, Misc. Criminal Applications 160 of the 2009, The Republic Vs Allan Feston George, Dave Kahova and others, Confirmation Case 290 of 2015** and **Letasi v Republic MSCA Criminal Appeal 13 of 2016**.

The arguments, under section 36 of the Courts Act, that courts, should sit in places designated by the Chief Justice are correct, so too are arguments that courts must be open in compliance in section 71 of the Criminal Procedure and Evidence Code However the issue, in this case, in my view, is the power of a subordinate court to transfer proceedings to itself from one place to another. The proceedings in this case commenced before a regularly constituted court in open court. The proceeding were subsequently moved to prison premises and thereafter, moved back to open court. Section 73(3) of the Criminal Procedure and Evidence Code provides that:

> *"73(3) A subordinate court may, on application or of its own motion, at any stage in an inquiry or trial, transfer such inquiry or trial, for hearing before itself at some other place".*

This is the general power that mandates a court to move itself to another place. This power is discretionary. Like any discretionary power of the court it must be exercised judiciously. This power is general and must be interpreted expansively in conjunction with section 71 of the Criminal Procedure and Evidence Code, and section 60 of the Courts Act; and, whether the court be open or closed, should be based on the "interest of justice" or "other sufficient reasons". The power to move the court to "locus in quo" is covered by this section.

The applicants omitted to disclose that the proceedings were moved, at their request, following concerns about security. To address the concerns about security, the trial court moved the court to prison premises. The appellants are not contending that the magistrate exercised her discretion wrongly. I find that the trial court properly exercised its discretion when it moved the court, properly constituted, to prison premises on grounds of security of the parties and orderly conduct of that part of the proceedings.

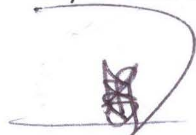
As to whether the applicants should be released on bail pending appeal, I decline. A convicted person does not have a right to be released on bail: see **Jonathan Mekiseni and Others vs The Republic, Criminal Appeal 14 of 2015.** A convict can only be released on bail pending appeal at the discretion of the court, "if it deems it fit". The practice of the courts, which is now trite, is that the courts would only exercise such discretion if there are "unusual, or special or exceptional circumstances". I am aware that in the case of **Letasi v the Republic (Supra)** and **McDonald Kumwembe and Others vs The Republic Malawi Supreme Court of Appeal Criminal Case No. 5A and 5B of 2017**, Mwaungulu SC, JA criticized this categorization as curtailing the statutory discretion. I would not think so. As said in **Jonathan Mekiseni and Others v Rep. (Supra),** and this was also acknowledged by my brother Justice in the case of **Letasi (Supra)**, it is the duty of the courts to develop the principles under which discretionary powers should be exercised. In this respect the courts have developed the principle that this discretionary power should only be exercised where there are "unusual' or special or exceptional circumstances". "Unusual or special or exceptional circumstances" include: that the appeal is likely to succeed or that the appellant will have served the full term before the appeal is decided: see **Suleman v Republic (2004) MLR 393, Chihana vs Republic MSCA Criminal Case No. 9 of 1992.** These, in my view, are examples of "unusual or special or exceptional circumstances". I do not think that the list of what amounts to "unusual or special or exceptional circumstances", is exhausted or closed. It is open to the courts to develop others.

I have closely examined Mwaungulu SC JA exposition on bail pending appeal that it should be based on the "interests of justice", than on "unusual or special or exceptional circumstances", which he spouses 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 **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.

The facts in this case disclosed that the appellants were involved in trafficking a boy. They wanted the boy to work in their maize mill. Money changed hands. The boy who was 'bought' however, has not, since, been seen or traced. There is no explanation

as to what happened to the boy. I do not find any unusual or special or exceptional circumstances on which I would deem it fit to release the applicants on bail pending appeal. This application must fail and is dismissed entirely.

Pronounced in chambers this 29th day of March 2018 at Blantyre



JUSTICE E.B TWEA SC
JUSTICE OF APPEAL