IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CRIMINAL REVIEW APPEAL NO. 01 OF 2022

(Being High Court Lilongwe District Registry Criminal Review Case No. 16 of 2021)

BETWEEN:

PAULOS NORMAN CHISALE.................................APPELLANT

AND

THE REPUBLIC..RESPONDENT

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA JA

Mrs Gwaza, Chief State Advocate, of Counsel for the Respondent

Mr Salamba, Senior Deputy Chief State Advocate, of Counsel for the Respondent

Mr Gondwe, of Counsel for the Appellant

Mr Chinkono, Recording Officer

RULING

Kalembera JA

This is an Order on the Respondent's application for dismissal for want of prosecution brought under Paragraph 1(a)(iii) of Practice Direction No.1 of 2010. The application is supported by an affidavit and skeleton arguments. The Appellant is opposing this application and has filed an affidavit and skeleton arguments in opposition to the application.

The facts as obtained from the judgment of the court below as well as affidavit in support and opposition to the application are that, the Appellant stands charged before the Senior Resident Magistrate Court sitting at Lilongwe with the offences of

Personation of a person named in a certificate, contrary to Section 391 as read with Section 358 of the Penal Code; Presenting false information to a person employed in the public service contrary to section 122 of the Penal Code and Intimidation contrary to section 88 (1)(a) of the Penal Code.

The Appellant pleaded not guilty to the Charges. During the course of the trial, the State filed a Notice to Amend the charge; and by ruling of the lower court the amendment of the charge sheet was allowed. However, the lower court noted that after amendment of the charge sheet the defendant was not called to take a fresh plea. On 7th May, 2021 the lower court wrote the parties via email that a fresh plea be taken, the State did not object to the court's directions while the Defence objected to the court's directions. On 21st May 2021 the lower court took further steps and referred the matter to the High Court for directions. The High Court through its ruling dated 10th August, 2021 directed that the inadvertent omission to take fresh plea following amendment is curable under section 3 of the Criminal Procedure & Evidence Code (CP&EC) hence the lower court should proceed with trial.

The Appellant being dissatisfied with the order of the High Court sitting in Lilongwe delivered on 10th August, 2021 lodged an appeal to this Court on 6th January, 2022. The matter was set down for hearing for directions on 19th January, 2022 and the matter was adjourned to 23rd March, 2022 with the parties given directions to be complied with before the next hearing. The Appellant having not complied with the order of this Court to file arguments, the Respondent on 17th May, 2023 filed an Application for dismissal of the Appellant's Appeal for want of prosecution but the stamp for the Application is dated 26th May,2023. On the other hand, on 17th May, 2023 the Appellant also filed skeleton arguments in support of the appeal he lodged to this Court. The Application for dismissal of appeal for want of prosecution was heard by this Court on 24th August, 2023.

In his address Counsel for the Respondent referred the Court to **Section 7 of the Supreme Court of Appeal Act** which provides that;

> *A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal:*
> *Provided that—*

(a)in criminal matters, if a single member refuses an application for the exercise of any such power, the applicant shall be entitled to have his application determined by the Court;

Counsel argues that in reference to the above stated provision their application to dismiss an appeal for want of prosecution can be heard and determined by a single member. Counsel further submitted Paragraph 1 of Practice Direction No. 1 of 2010 which provides that;

(a)In all substantive appeals-

(i) the appellant shall file with the Court Skeleton Arguments within fourteen days after filing the appeal in this court and shall during the same period serve a copy of the skeleton arguments on the respondent;

(ii) if the appellant fails to comply with subparagraph (a) (i) of this paragraph, the appeal shall not be set down for hearing and may at the court's instance be dismissed;

Counsel further argues that in line with the stated paragraph 1 of Practice Direction of 2010, the Appellant was supposed to file and serve the skeleton arguments in support of his application within fourteen days of filing his appeal and that the skeleton arguments should have been filed in February, 2022 and this was never done. Counsel further cited the case of **Misozi Chanthunya v Republic** MSCA Criminal Appeal Number 2 of 2019 where it was held that skeleton arguments should be filed within fourteen days after the filing of the notice of appeal not after the registrar notifies the parties that the record of appeal is ready.

Counsel further argues and submits that under Paragraph 1 of the above stated Practice Direction the matter should be dismissed as this is a more just and fair disposal of the matter, hence it will allow every party involved to finally put this matter to rest. In addition, Counsel argues that the fourteen days has turned into over a year and this is a failure of the Appellant to comply with subparagraph (a) (i) of the cited Paragraph 1 of the Practice Direction. This is proof that the delay is inordinate and excusable and the delay has prejudiced the Respondent's.

All in all, Counsel prays that appeal should be dismissed for want of prosecution since the Appellant has failed to comply with Paragraph 1 (a)(i) of the Practice Direction No. 1 of 2010.

Counsel for the Appellant argues that to dismiss or strike out a notice of appeal is to summarily determine an appeal and a single member of the Supreme Court of Appeal has no jurisdiction under Section 7 of the Supreme Court of Appeal Act. Also see ***Suleman v Suleman*** MSCA Civil Appeal 64 of 2018 and ***NBS Bank plc v Dean Lungu t/a Deans Engineering Co Ltd*** (Commercial Cause 14 of 2015; MSCA Civil Appeal 83 of 2019 [2019] MWSC 11 (7 November 2019).

Counsel further cited the case of ***Registered Trustees of Youth and Society v Grezelder Jeffrey and Others*** Civil Appeal No. 70 of 2018 where **Justice Mzikamanda**, as he then was, decided that a single member of the Court has no power to determine an appeal more so summarily and that inherent jurisdiction of the Court cannot be relied upon a guise for such jurisdiction in the face of clear statutory provisions.

Counsel in further reliance to the same case of **Registered Trustees of Youth and Society v Grezelder Jeffrey and Others** (Supra) wherein **Mzikamanda JA** stated as follows;

> *"Inherent Jurisdiction is doctrine of the English common law that court has jurisdiction to hear any matter that comes before it, unless statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal. The doctrine of inherent jurisdiction is resorted to sometimes in order that injustice be avoided and efficiency in litigation be ensured. Some look at inherent jurisdiction as residual, automatic or ex officio authority of the court of law to regulate proceedings before it to facilitate the exercise of full judicial powers by the court."*

Counsel asserts that this court has no jurisdiction to entertain the present application hence this Court should dismiss the Application by the Respondent.

Counsel further cites the case of **Misozi Chanthunya v Republic** (supra) where it was held that;

> *"The dismissal of an appeal on the basis of failure to file skeleton arguments has dire consequences and extinguishes an Appellant's right to appeal. Under our constitutional dispensation, the litigant's right to appeal against the decision of a court or tribunal is fundamental and*

sacrosanct, and that right should not be ordinarily extinguished, curbed curtailed, or abridged except in rare circumstances, and always on the basis of and justifiable reason. In the courts view, dismissal of a matter for failure to file skeleton arguments should be sparingly done and if so, only in exceptional cases."

Counsel cites **Order V Rule 1 of the Supreme Court Rules** which provides that;

> *"Non-compliance on the part of an appellant with these Rules or with any rule of practice for the time being in force shall not prevent the further prosecution of the appeal if the Court considers that it is in the interests of justice that non-compliance be waived or the appellant given a further opportunity to comply with the Rules. The Registrar shall forthwith notify the appellant of any directions given by the Court under this Rule, where the appellant was not present at the time when such directions were given."*

Counsel further cites the case of **Chiponda v Chilumbu** MSCA Civil Appeal No. 49 of 2015, The court stated that;

> *"Dismissal for want of prosecution occurs where parties required to take certain course of actions premised of fixed or reasonable time fail, to do so. Dismissal for want of prosecution serves two purposes. First, where they result in dismissal of the whole action they stop the process which, but for want of dismissal, would be unjust or prejudicial through tardiness or laches. They, with the real threat of dismissal of the action or process and without stalling proceedings, investigate and spur the sort of actions that further the action to speedy, timely and fair conclusion."*

Further, Counsel submits that this court does not have jurisdiction to sustain this application as provided for in the Supreme Court of Appeal Act and other authorities provided to support this. Counsel submits that the Appeal must not be dismissed as doing such would be limiting the Appellant's right to appeal. According to the authorities submitted a litigant's right to appeal against the decision of a court or tribunal is fundamental and sacrosanct, and that right should not be ordinarily

extinguished, curbed, curtailed or abridged except in rare circumstances and always on the basis of and justifiable reason.

It comes out clearly that the Respondent is challenging this Court's jurisdiction to hear this application to dismiss the matter for want of prosecution. The Respondent argues that based on section 7 of the Supreme Court of Appeal Act, a single member of the Court cannot hear and determine an application to dismiss the matter for want of prosecution. I must stste from the outset that Counsel for the Respondent is blowing both hot and cold. He is relying on **Chiponda v Chilumbu** and **Misozi Chanthunya v Republic** in which single members of the Court were called upon to dismiss an appeal for want of prosecution. Counsel for the Respondent does not challenge the Court's jurisdiction in those matters but wants this Court to adopt the holding in those cases that dismissal of a matter for failure to file skeleton arguments should be sparingly done and if so only in exceptional circumstances.It is my considered view that section 7 of the Supreme Court of Appeal Act does not preclude a single member from hearing an application to dismiss a matter for want of prosecution. Section 7 states:

> *"A single member of the Court may exercise any power vested in the Court* ***not involving the hearing or determination of an appeal****:*
>
> *Provided that—*
> *(a)in criminal matters, if a single member refuses an application for the exercise of any such power, the applicant shall be entitled to have his application determined by the Court;"* (emphasis supplied)

Clearly, section 7 precludes a single member from hearing or determining an appeal. What is hearing and determining of an appeal? If for instance a single member like in the **Misozi Chanthunya v Republic** (supra) strikes out a notice of appeal for having not been duly filed, is that hearing or determining of an appeal? In the case of ***The Bottling & Brewing Group Limited (t/a Carlsberg Malawi Limited) and Others –v- Geobra Kamanga*** MSCA Civil Appeal No. 34 of 2022 this Court had this to say:

"The application before this Court would therefore only come before the full Bench ***if it involved the hearing or determination of the substantive appeal herein****. The application before this Court is to amend the Notice of appeal and grounds of appeal*

in the manner set forth in red ink in the draft Amended Notice of Appeal filed together with the application. Thus, the application before this Court does not in any way involve or cannot result in the determination of the substantive appeal herein."(emphasis supplied)

Thus, the said section 7 precludes the single member from hearing the merits of an appeal. In other words, determining the grounds of appeal. It is therefore unsurprising that single members of the Court have invariably heard and determined applications to dismiss an appeal for want of prosecution. In this matter, therefore, as a single member of the Court, I am only precluded from dismissing or determining any ground of appeal on its merits.

I will now proceed to determine whether the appeal should be dismissed for want of prosecution. In ***Attorney General v Msalika*** MSCA Civil Appeal No. 38 of 16 (unreported) wherein Kamanga JA, SC noted:

> "In my considered view the principles enumerated by Salmon LJ in ***Allen v Sir Alfred McAlpine & Sons*** apply equally to a plaintiff who applies for the dismissal of a defendant's appeal for want of prosecution. Thus, in the present case the Respondent must show that there has been inordinate delay on the part of the Attorney General in prosecuting his appeal; that the delay is inexcusable; and that the Respondent has been, or is likely to be seriously prejudiced by the delay in prosecuting the appeal."

Whilst I agree with the observation made by Kamanga JA, above, I must say that I am skeptical, if the above holding should likewise apply in criminal appeal cases. Diplock LJ stated in the same case of ***Allen v Sir Alfred McAlpine & Sons*** at pages 552-553 as follows:

> "The procedure of the English courts is based on the adversarial system. The underlying principle of **civil litigation** is that the court takes no action in it on motion but only on the application of one or other of the parties to the litigation, the assumption being that each will be regardful of his own interest and take whatever procedural steps are necessary to advance his cause. There are three stages between cause of action and trial: the first from the cause of action to service of writ....; the second

from service of writ to settling down the trial; the third from setting down to the trial itself. Each of these stages inevitably takes time. The plaintiff's solicitor has no control over time taken before he is consulted or after the action has been set down for trial. The former depends on the client: the latter on the state of business of the courts. What the plaintiff's solicitor can control and should avoid is any delay between first being consulted and setting the action down for trial." [Emphasis supplied]

The principles underpinned in the above case cannot be said to equally apply in criminal appeal matters. We must be very slow; I repeat very slow in equating the adversarial system applicable in civil litigation to criminal litigation. The State should find ways of ensuring that the right of an accused to appeal is satisfied and not stifled. Having said that, I must acknowledge that the basis for bringing this application to dismiss for want of prosecution is not only based on what Paragraph 1 of Practice Direction No. 1 of 2010 provides for. As has been averred by the State, the matter was set down for hearing for directions on 19th January, 2022 and the matter was adjourned to 23rd March, 2022 with the parties given directions particularly the Court directed that skeleton arguments be filed before the next hearing. The Appellant has not complied with the order of the Court to file skeleton arguments hence the Respondent is making the Application for dismissal for want of prosecution because of the unreasonably longtime the Appellant has taken to prosecute the appeal.

Furthermore, section 42 (2) (f) (i) of the Constitution is of much importance to the present application. The said section states:

(2) 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—

(i) to public trial before an independent and impartial court of law <u>within a reasonable time after having been charged</u>; [Emphasis supplied]

Therefore, in my considered view, cases that are not being prosecuted or tried within reasonable time because of pending multiple applications or appeals or reviews and

hearings before the courts, the said applications or appeal or reviews must be tested against section 42 (2) (f) (i) of the Constitution of an accused having to be tried within reasonable time. And one of the viable way of testing such applications is bringing the present application herein. In other words, the question the Court is being asked to address is whether the present appeal delays, is infringing on the Appellant's right to be tried within a reasonable time?

It is on that basis; I must say that notwithstanding my skepticism above of having to equate adversarial civil litigation to criminal litigation, where a party has failed to comply with a time limit fixed by a court order or direction or by a rule and practice direction, the Court has discretion to dismiss the matter, be it civil or criminal. In the case of ***Suleman v Suleman*** MSCA Civil Appeal 64 of 2018 it was stated as follows;

> "3.10 In summary, the relevant case authorities provide the following guidance: Firstly, while it is generally accepted that the court has unqualified discretion to strike out a claim or proceedings where a party has failed to comply with a time limit fixed by a rule, practice direction or court order, there are no hard and fast rules, and the court has to make a broad judgement having regard to all relevant circumstances may include the length of , explanation and responsibility for, the delay; whether the other party has suffered prejudice as a result and, if so, how the prejudice can be compensated for, and whether the delay is such that it is no longer possible to have a fair trial. The relevant circumstances may also include the weakness of the claim even if it is not so weak as to have no real prospects. Secondly, in considering what is just and proportionate order to make where a party has failed to comply with a time limit fixed by a rule, practice direction or court order, the court must be mindful that the right to a fair trial is a right enjoyed by defendants as well as claimants", and must, therefore, have regard to and consider the alternative sanctions to that of striking out an action or proceedings. Where a delay occasions prejudice short of an inability of the court to be able to provide fair trial, there certainly would be or may be scope for the use of other forms of sanction rather striking out an action or proceedings. Where the conclusion that is

> reached is that the prejudice has resulted in inability of the court to deal fairly with the case there can only be one answer and one sanction; that is for the action or proceedings to be struck out. Thirdly, delay, even a long delay, cannot by itself be categorized as an abuse of process without there being some additional factor which transforms the delay into an abuse of process. However, it may do so if it involves a wholesale disregard for the rules of court with full awareness of the consequence. Furthermore, to commence or to continue proceedings with no intention to bring proceedings to a conclusion may constitute an abuse of process.". [Emphasis supplied]

In ***Grovit and Others v Doctor and Others*** [1997] UKHL 13 it was stated that;

> "The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action."

The appeal itself was lodged in this court on 6th January, 2022 by the Appellant when he filed and served the grounds of appeal. It is clear that on 19th January 2022 a hearing of directions took place and the court's directions was for the Appellant to file skeleton arguments and the court record of the Senior Resident Magistrate court and High Court form part of the appeal documents directions be done by 23rd March, 2022.

First, it is important for the parties herein to take note that in accordance with Practice Direction No. 1 of 2010, the Appellant was required to file skeleton arguments right after the filing of the appeal:

> *(i) the appellant shall file with the Court Skeleton Arguments within fourteen days after filing the appeal in this court and shall during the same period serve a copy of the skeleton arguments on the respondent;*

Thus, the order of the Court must be understood to mean that the record of appeal was required to be done first. In other words, the record of appeal ought to have been filed by the 23rd March 2022. However, I should also point out that, in terms of criminal appeals, Order IV rule 8 of the Supreme Court of Appeal Rules:

> *8. Preparation of record*
>
> *(1) When the Registrar of the Court below has received a notice of appeal or a notice of application to the Court for leave to appeal or for extension of time within which such appeal shall be given, the Registrar of the Court below shall prepare the record of appeal in the manner hereinafter prescribed and shall file the record in the Supreme Court. He shall also obtain the original exhibits in the case as far as practicable and any original depositions, information, inquisition, plea or other documents usually kept by him, or forming part of the record of the Court below, together with the originals of any recognisances entered into or any other documents filed in connection with the appeal or application.*
>
> *(2) The Registrar shall forward to the appellant and to the Director of Public Prosecutions a copy each of the record:*
>
> *Provided that if the appellant is not in custody a copy of the record shall only be supplied to him on request.*
>
> *(3) The Court or Registrar may allow the return of any document to any party pending the hearing of the appeal and subject to such conditions as it or he may impose.*

It is clear from the above provision that, preparation of record of appeal in criminal appeals is the responsibility of the Registrar of the Court below. Therefore, it is my considered view that the Appellant was only required to file skeleton arguments after the record of appeal was filed with the Court's registry. The record shows the record of appeal was entered with the Court on 15th August, 2022. It is from this date that the Appellant was required by the Practice Direction to file his skeleton arguments in support of the appeal. But, as the factual background has been laid out above, the Respondent filed an application to dismiss the appeal for want of prosecution on 17th May 2023, albeit with not court stamps because the Supreme Court of Appeal was sitting in Lilongwe. Of course, the stamp of the Supreme Court Registry to the application only bears 26th May, 2023 because that is when the Court came back from Lilongwe.

It is important to notice that the Appellant took the step to file the skeleton arguments on 17th May, 2023. The Appellant claims that he filed the skeleton arguments earlier on 17th May 2023 and also claiming that the Respondent filed this application on 26th May, 2023 and not 17th May, 2023. Whilst the Appellant argues and submits that he filed skeleton arguments before the application to dismiss the appeal for want of prosecution, the Appellant has failed to demonstrate why he failed to comply with the Court's direction of having to file skeleton arguments within 14 days. As if that is not enough, the Practice Direction itself is clear that he must have filed the skeleton arguments within 14 days after the filing of the appeal. The record of appeal was filed with the Supreme Court Registry around 7th December 2022, the Appellant's Counsel was served with the record of appeal on 7th February, 2023 the Appellant filed skeleton argument three months later. Arguably, after being notified of the Respondent's application herein. It is clear that the Appellant failed to comply with both the Court's directive and the said Practice Direction.

It would be a moot exercise for this Court to start discussing whether the skeleton arguments where filed prior to the application herein, when it is clear that he failed to file skeleton arguments as per direction of the Court. Indeed, relying on ***Suleman v Suleman*** (supra) in considering what is just and proportionate order to make where a party has failed to comply with a time limit fixed by a rule, practice direction or court order, the court must be mindful that the right to a fair trial is a right enjoyed by defendants as well as claimants, in this case the Appellant and the State and must, therefore, have regard to and consider the alternative sanctions to that of striking out an action or proceedings. The State argues that it is unfair that the Respondent State witnesses and the trial court should be at the mercy of the Appellant when he has not shown any interest to prosecute his appeal after he had also obtained the stay of the actual trial in the court below. It must be said that the Appellant has failed to provide any justifiable reason on why he did not comply with Court's directive or file skeleton arguments within the 14 days. The Appellant's only argument is that he filed skeleton arguments prior to the filing of the application herein. But were the skeleton arguments duly filed?

As has already been found above, the filing of the skeleton arguments was done outside the 14 days. In other words, the Appellant did not comply with the direction of the Court for no reason. In actual fact, as per Practice Direction No. 1 of 2010 and as per Court's direction I must find that the said skeleton arguments were not duly

filed with the Court. After the period of 14 days had elapsed the Appellant should have brought an application to extend the time within which he was required to file skeleton arguments:

> *Discretion of the Court to waive or abridge prescribed periods*
>
> *Upon a formal application by any party, the Court may in its discretion, waive or abridge the periods prescribed under Paragraph 1 of this Practice Direction.*

After having found that the Appellant has not duly filed his skeleton arguments in support of the appeal, it is unsurprising that this matter has never been set down for hearing by the Court. Perhaps, if it was considered the Registrar failed to do so because of this pending application. Nonetheless, the Practice Direction is clear, failure to file skeleton arguments has two consequences. First the matter, may not be set down or be dismissed at the Court's instance. In the present application, the Court has been moved to dismiss the appeal arguably because of the pending trial in the lower court. In other words, the appeal is stifling the trial in the lower court. Where a delay occasions prejudice of the court to be able to provide fair trial, there certainly would not be any scope for the use of other forms of sanction rather than striking out an action or proceedings. Where the conclusion that is reached is that the prejudice has resulted in inability of the court to deal fairly with the case there can only be one answer and one sanction; that is for the action or proceedings to be struck out.

In this case, because of the delay caused by the Appellant to prosecute the appeal, only shows that the Appellant is using the appeal to delay the prosecution of the charges in the lower court. Perhaps, it is at this juncture, I should discuss about inchoate appeals. While, this new principle in civil matters has barely been applied in criminal appeals, in my humble view, I think it should also apply in criminal matters. In ***Toyota Malawi Limited v Jacque Mariette***, MSCA Civil Appeal No. 62 of 2016 (unreported) this Court stated:

> "The maxim interest *rei publicae ut sit finis litium*, in our view does not advocate an idle principle. It is, as the maxim espouses, in the interests of public that litigation should come to an end. Why handle two more

appeals in one and the same matter when one appeal can easily conclude the said matter with finality and within a reasonable time? Why spend so many years on the suit before the parties find closure to their issues in such matter. Why allow a case to go on and on without any end coming within site due to permitting a practice of splitting what could be one wholesome and complete appeal into several appeals. It is for these reasons that we believe we should stop entertaining appeals on inchoate judgments. Henceforth, we think it is best to only entertain appeals on complete and enforceable judgments. A judgment pending assessment of damages only becomes a complete and enforceable judgment once the assessment has been done and there is an enforceable quantum of damages that can be recovered or otherwise enforced".

In a nutshell, the above excerpt provides for the principle of inchoate appeals recently developed by the Court. As a matter of fact, section 11 of the Supreme Court of Appeal Act, only allows appeals on final judgment:

(1) Subject to the other provisions of this section, any person aggrieved by a final judgment of the High Court in its original jurisdiction may appeal to the Court.

(2) Any person aggrieved by a decision of the High Court in its criminal appellate jurisdiction or in exercise of the powers of review conferred upon the High Court by Part XIII of the Criminal Procedure and Evidence Code may appeal to the Court on a matter of law but such decision shall be final as to matters of fact and as to severity of sentence:

The only circumstances, as in this case where an appeal not on a final judgment is allowed to this Court is when the High Court is exercising its powers of the review. Albeit, such an appeal must be on matters of law only. Hence, we can see already the jurisprudence developed by the provisions of the Supreme Court of Appeal Act, is for this Court to hear appeals on final judgment. More importantly, section 12 of the Supreme Court of Appeal Act states:

"*(1) The Court shall allow an appeal under section 11 if it thinks that the judgment appealed against should be set aside—*
(a) on the ground that it cannot be supported having regard to the evidence;
(b) on the ground of a wrong decision of any question of law; or
(c) on any ground that there was a miscarriage of justice, and in any other case shall dismiss the appeal:

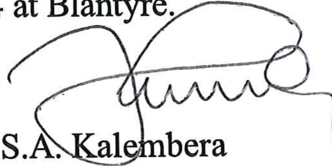
Provided that the Court may, notwithstanding the fact that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." [Emphasis supplied]

While appeals can be entertained by this Court on judgments that are not final, the law has attempted to limit instances where this Court should be hearing appeals on matters which have not been fully disposed of by the court below either in its original jurisdiction or in its appellate jurisdiction or in exercise of powers of review. The decision of the Court below in referring back to the lower court to proceed with the matter is inchoate. While I must refrain to discuss whether it is likely the matter might come back to this Court for appeal against the decision of the High Court at some point, it is imperative for me to caution myself on appeals coming to this Court on issues that are not final that in the end, stifle trials and impact the right to fair trial. The Court below, made its ruling on 10th August 2021, to date, the trial is at pause. The conduct of the appeal shows the Appellant having little interest in prosecuting the appeal. The Appellant whilst having the right to have recourse by way of appeal or review to a higher court than the court of first instance under section 42 (2) (f) (viii) of the Constitution; he should not be the one limiting his very right under section 42 (2) (f) (i) of the Constitution to public trial before an independent and impartial court of law within a reasonable time after having been charged.

All in all, based on the findings and observations herein, it is very clear to this Court that the facts of the matter warrants for the granting of the application to dismiss the

appeal for want of prosecution. Consequently, the appeal is hereby dismissed for want of prosecution. The trial in the lower court must proceed.

MADE this 24th day of April 2024 at Blantyre.



S.A. Kalembera
JUSTICE OF APPEAL