REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

CRIMINAL APPEAL No. 01 of 2023

(Being High Court, Zomba Registry, Criminal Review Case No. 448 of 2022)

BETWEEN

PRINCE HENDERSON .....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: HON. JUSTICE L.P. CHIKOPA SC, DEPUTY CHIEF JUSTICE
HON. JUSTICE F. E. KAPANDA SC, JA
HON. JUSTICE H.S.B. POTANI JA
HON. JUSTICE J. KATSALA JA
HON. JUSTICE M.C.C. MKANDAWIRE JA
HON. JUSTICE D. MADISE JA
HON. JUSTICE D. KAMANGA JA
L. M. Msuku, of counsel for the Appellant
B. Phiri, of counsel for the Respondent
Masiyano and Minikwa, Court Clerks
Mutinti and Msimuko, Court Reporters

JUDGMENT

Chikopa SC, Deputy Chief Justice

1. I have read in draft the opinion of Katsala, JA and I agree with the reasoning and the conclusions therein. I dismiss the appeal.

Kapanda SC, JA

2. I have had the opportunity to read in draft the judgment by Katsala, JA and I entirely agree with it. I too dismiss the appeal.

Potani, JA

3. I too have read the judgement of Katsala, JA herein and for the reasons he has given, I dismiss the appeal.

Katsala, JA

My Lord Deputy Chief Justice, My Lady and My Lords,

4. The appellant comes to this Court seeking to appeal against the decision of Masoamphambe J sitting in the Criminal Division of the High Court at Zomba, which dismissed his application for a review of the decision of the Chief Resident Magistrate's decision to dismiss the appellant's preliminary objection regarding the appearance of public prosecutors from the Anti-Corruption Bureau in prosecuting a case against him.

5. The brief facts of the case are as follows: The appellant was brought before the Chief Resident Magistrate sitting at Zomba, where he has to answer a total of nine counts – specifically, four counts of forgery contrary to section 356 of the Penal Code, four counts of uttering false documents contrary to section 360 of the Penal Code and one count of giving false information to persons employed in public service contrary to section 122 (a) of the Penal Code. The prosecution of this case is being conducted by prosecutors, who are in the employ of the Anti-Corruption Bureau (hereinafter referred to as "the ACB"), having been appointed as public prosecutors by the Director of Public Prosecutions way back on 26th July, 2004.

6. When the matter came for hearing, the appellant raised a preliminary objection against the prosecutors' appearance in his case and sought the lower court to dismiss the matter on the ground that the ACB lacked the mandate to prosecute the matter in which all the charges were wholly made under the Penal Code and devoid of any elements of corruption. The lower court dismissed the application.

7. The appellant then applied to the High Court for a review of the lower court's decision. Following the review process, the court dismissed the application on the basis that it had no merit.

8. The Appellant then filed a notice of appeal to this Court on two grounds:

   (i) The court erred in law in holding that the Anti-Corruption Bureau can investigate and prosecute matters wholly based on the Penal Code with no related corruption charges.

   (ii) The court erred in law in its application for the existing authorities to hold that the Anti-Corruption Bureau can prosecute the within matter.

9. At the hearing of the appeal, it emerged that the appellant had not sought the leave of this Court nor of the court below to appeal. The law on this point is found in section 11 (2) of the Supreme Court of Appeal Act which states that:

   "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:

   Provided that **no appeal shall be made** under this subsection against a decision of the High Court dismissing an appeal summarily under section 351 of the Criminal Procedure and Evidence Code or against any decision made in exercise of such powers of review or against refusal to entertain an appeal out of time **without the leave of the Court or of the High Court**."_(Emphasis supplied)

10. The words used in this provision are unambiguous. The prohibition against entertaining criminal appeals that do not comply with this provision is mandatory. It leaves no option or discretion on the part of an appellant. The use of the word "shall" denotes the mandatory nature of the provision. The Appellant therefore did not have a choice on whether to obtain leave or not. It was mandatory to do so.

11. Obtaining leave to appeal is fundamental. As was held by this Court in *Malawi Telecommunication Limited v Henry Kabathi and others* MSCA Civil Appeal No. 85 of 2015 (unreported) if leave to appeal is not obtained or granted, this Court has no jurisdiction to hear or determine the matter because, in simplest terms, there is no appeal lying before the Court.

12. Further, in *JTI v Kapachika* MSCA Civil Appeal No. 52 of 2016 (unreported), this Court emphasised on the importance of leave to appeal. It said:

"This appeal being, so to speak, a second-bite in the process of appeals, the law as we understand it, would not allow us to accommodate it, unless it can be shown that it has been legally sanctioned to be so brought before us. This legal sanction must come by way of the appellant either obtaining the leave of the High Court, or the leave of this Court, to so appeal."

13. Now, it has been established that the appellant did not obtain leave to appeal in the court below or this Court, the effect is that there is no competent appeal before this Court. In essence, it means that the purported appeal is non-existent.

14. We also observe that the appellant's purported appeal was filed out of time and without the leave of the Court. Section 17(1) of the Supreme Court of Appeal Act states that:

> "If a person desires to appeal under this Part from the High Court to the Court, he shall, within thirty days of the judgment against which he desires to appeal and in such manner as may be prescribed by rules of court, give notice to the Registrar of the High Court of his intention to appeal."

15. Thus, the appellant had 30 days within which to lodge his notice of appeal. The Order on Review in the court below was made on 22 February, 2023. This means that the appellant had until 22 March 2023 within which to appeal. However, the appellant filed his notice of appeal on 16 May, 2023. This was more than 12 weeks after the Order on Review was made. Clearly, the appellant needed to make an application to this Court for an enlargement of the time within which to file the notice of appeal.

16. The law is very clear; where a notice of appeal has been filed out of time, and without an order of the Court extending the time within which to appeal, there is no appeal. In *Chiumbu v Republic* [1978-80] 9 MLR 87 at p. 89 Mead, J cited with approval the English case of *R v Lesser* [1939] 27 Cr. App. R. 69 p 71 where Humphreys, J said:

> "There appears to be a danger of the rules which govern the proceedings of this Court being regarded as of no importance. The Court has listened to repeated applications for extensions of time for leave to appeal, which have been put forward as if granting of such applications were a mere matter of form. While the Court is always willing to listen to such an application ... it should be clearly

understood that a person who has failed to appeal within the ten days allowed by statute has lost his right of appeal." (Emphasis supplied)

17. Further, in *Kuthawe & Another v Republic,* MSCA Miscellaneous Criminal Appeal No. 8 of 2015 (unreported), Kapanda SC, JA said: -

> "The expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties (the state and the appellant). In other words, when the period of limitation prescribed has expired, the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light heartedly disturbed."

18. Indeed, under our law, a litigant is entitled to believe that a case has reached its conclusion at the expiry of the period prescribed for filing an appeal against a judgment. This expectation is entirely legitimate and should only be interfered with when there are good and substantial reasons. Consequently, an application for an extension of time within which to file a notice of appeal should never be treated as a matter of course. Such an application deals with a serious legal issue and must be accorded the seriousness it deserves. The fact that the law may allow such an application to be made *ex parte* does not diminish its significance and importance. Refer to the case of *Malawi Housing Corporation v Edwin Nyirenda* Civil Appeal No. 26 of 2022 (unreported).

19. In the present matter, the appellant lost his right to appeal when the prescribed period for appeal expired. There was no application by the appellant seeking for an extension of time within which to lodge an appeal. As a result, there is no appeal. The purported appeal constitutes a futile exercise. This Court cannot waste time to hear the purported appeal (regardless of the importance of the issues it raises) as there is no mandate under law to do so.

20. Ordinarily, we would have concluded our decision here; but due to the circumstances surrounding this matter, as we as the discernible trend that is slowly growing in our jurisdiction, we feel compelled to articulate a few observations.

21. Recently, there has been a notable increase in applications for review of proceedings, especially in criminal matters. We observe that the review process is increasing being used as an alternative to the appeal process. We wish to express our unequivocal condemnation of this trend. We would

reiterate the warning cum advice graciously issued by our brother Chikopa SC, JA (as he then was) in *Lin Yun Hua v Republic* MSCA Miscellaneous Criminal Application No. 02 of 2023 (unreported) of using reviews as an alternative to appeals. He stated:

> "If only in passing let us say something about the powers of criminal review exercisable by the High Court and the Resident Magistracy. Under the Courts Act (Cap 3:02 of the Laws of Malawi) they are provided for from sections 25 to 28. Without going into specifics, the powers are exercisable in accordance with the law for the time being in force in relation to criminal procedure. In other words, the Criminal Procedure and Evidence Code (CP&EC). The powers are supervisory and revisionary. In that regard the High Court can, if it appears desirable in the interests of justice, either by its own motion or on application, call for the record of any matter before a subordinate court and give such directions for the further conduct of that matter as justice may require. The emphasis is on the interests of justice and justice. The High Court should therefore only act if it is convinced that the same is in the interests of justice.
>
> Similarly, whatever directions it gives should only be motivated by justice...When the Courts Act speaks of reviewing at the instance of any party or person interested, it is talking more about locus standi and obvious irregularities being brought to the attention of the High Court as opposed to providing an avenue, alternative to appeals, for taking any and all grievances within a proceeding to the High Court in the manner of an appeal. That will only serve to delay proceedings.
>
> Similarly, the High Court itself must never call for files for review willy nilly. They should as much as possible only intervene in cases where intervention is clearly merited. Apart from occasioning delay, needless reviews will most likely amount to undue/unwelcome interference with the trial court's management of its case load. But perhaps more importantly they might raise questions about the reviewing court's impartiality. The Constitution in section 42 assumes an impartial court. Jumping into proceedings in the name of reviews might needlessly create the impression that the reviewing court is favouring one litigant as against the other. Let the aggrieved party appeal..."

22. We would emphasise that the revisionary jurisdiction of the High Court should only be invoked where some glaring acts or omissions may occasion a miscarriage of justice if not corrected. It should not be used as a substitute for an appeal. As noted in *Republic v Genti* [2000–2001] MLR 383 (HC) the

review mechanism serves to complement the right of appeal. In *Republic v Muhamed Abdul Ibrahim* [2010] MLR 311 at 314 (HC) the court observed that the prosecution should not exploit the review process in an undue manner, thus circumventing the established procedural avenues that are otherwise unavailable to them. The court stated that in the context of the review process, the emphasis must invariably "be on correcting the law" and not allowing one party to proceed at the expense of another, as if they have appealed, which remains an option should they so desire. In other words, no one should be allowed to argue an appeal under the guise of a review. The High Court of Malaysia in *Public Prosecutor v Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734-735 put it this way:

> "The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interests of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case."

23. Furthermore, the invocation of the review jurisdiction ought to be eschewed in order to avoid the micro-managing of the lower courts in conducting and managing their proceedings. The reason for this is that if every ruling rendered by a lower court that is unfavourable to a party were to be subjected to the revisionary jurisdiction of the High Court, it would result in floodgates of such applications, thereby inundating the High Court. Consequently, this would make it practically impossible for the lower courts to proceed with any case to its logical conclusion, which would be detrimental to the interests of justice.

24. It is imperative to remember that the appellant herein has not been convicted. In fact, witnesses have not even been heard. Should the appellant ultimately face conviction, he will still have the right to pursue an appeal at which point he can challenge the determination of the lower court. In the case of the Court of Appeal in *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR, it was held that:

"We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practicing at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."

25. If the Appellant found the decision of the lower court to be unsatisfactory, he should have waited until the matter was concluded in order to initiate an appeal. However, he elected to pursue a review of the decision, subsequently appealing to this Court against the decision on review. In the meantime, the matter in the lower court has stalled since 11 August 2022, remaining so to the present date. Surely, such a delay is unacceptable. Public policy demands that criminal matters must be prosecuted with speed. A proper balance must be maintained between the rights of an accused and the court's duty to effectively manage its caseload.

26. In our view, the accused herein does not want the charges prosecuted conclusively. Therefore, he resorted to the review process primarily as a strategy for delay. We do not find any merit in the issue he raised in his application for review, bearing in mind the fact that the prosecutors involved were duly appointed as public prosecutors by the Director of Public Prosecutions way back in 2004, which is more than twenty years ago. It is obvious to us that this issue was raised as a tactic for delaying the conclusion of the proceedings in the lower court. This Court cannot condone such conduct.

27. It must be remembered that delays in conclusion of criminal matters erodes the public's trust and confidence in the country's criminal justice system. Especially when the accused persons are on bail, usually the public's perception is that bribery and corruption are in play and/or that the whole

criminal justice system is captured by criminals. Such perception and loss of trust and confidence in the criminal justice system may, among other things, lure the public to resort to mob justice – an affront to the Rule of Law.

28. Thus, we strongly urge all courts in the country not to condone delaying tactics in the prosecution and conclusion of cases. Courts must ensure that cases are prosecuted to conclusion within the shortest possible time.

29. Where it is clear, as it is in the present matter, that the intention for seeking a review of the proceedings is to protract the matter, the lower court or indeed the High Court should seriously reconsider whether the applicant should continue being on bail. In our view, the court would be perfectly entitled and justified in revoking bail to ensure that the accused can prosecute the review whilst in custody. This would ensure that only genuine and meritorious applications for review are made, and also that the applications are prosecuted with speed. We contend that the fact that the accused is on bail tends to fuel their desire to delay the prosecution and conclusion of cases. As such, it would only be proper that the bail be revoked to put that desire in check.

30. While this approach may appear drastic and draconian, we deem it necessary in the circumstances considering the unfortunate trend that has become prevalent in recent times. It is fundamentally against public policy for criminal trials to be obstructed in this fashion, and we express our hope that lawyers practising at the criminal bar will appropriately advise their clients to avoid engaging in such unnecessary delays and expose themselves to the possibility of having their bail revoked.

31. We have seriously considered the possibility of revoking the accused's bail ourselves but we decided to defer the issue to the lower court for consideration in the event that further delays are experienced on the instance of the accused.

32. However, it is our decision that all the orders for the stay of proceedings that were granted in this matter be and are hereby discharged. The case in the lower court must be called for directions on the way forward within 21 days from today. We so order.

Mkandawire, JA

33. I have read the judgment delivered by Katsala, JA herein and I concur.

Madise, JA

34. I had the privilege of reading in draft the judgment delivered by Katsala, JA. I concur with the conclusions and reasoning therein.

Kamanga JA

35. I had the privilege to peruse in draft the judgment delivered herein by Katsala, JA and I concur.

Pronounced at Blantyre this 2nd day of May, 2024.

.....

Hon. Deputy Chief Justice L.P. Chikopa SC.

.....

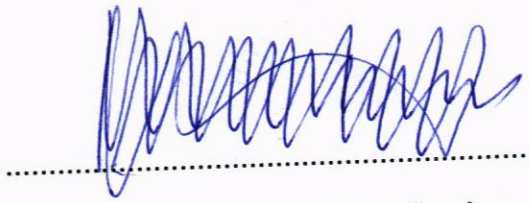
Hon. Justice F.E. Kapanda SC., JA

.....

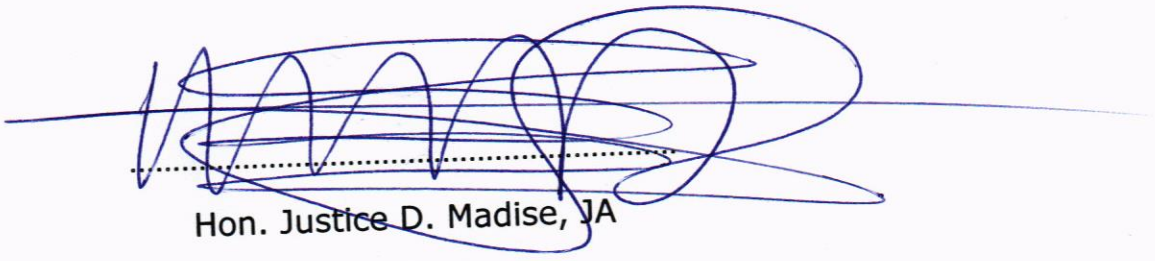
Hon. Justice H.S.B. Potani, JA

.....

Hon. Justice J. Katsala, JA.



Hon. Justice M.C.C. Mkandawire, JA



Hon. Justice D. Madise, JA

Hon. Justice D. Kamanga, JA