



**REPUBLIC OF MALAWI**  
**IN THE MALAWI SUPREME COURT OF APPEAL**  
**MISCELLANEOUS CRIMINAL APPLICATION NUMBER 03 OF 2024**

**(Being Criminal Review Case NO 1 of 2024,  
High Court Financial Division at Blantyre)**

**WILLIAM BILDERBERG**

**-V-**

**THE REPUBLIC**

**Coram; Hon Mr. Justice D Madise SC JA**

Messrs E Kachere, F Tambulasi for the applicant

Mr. Chisanga for the State

Mr. K, Chimkono Clerk

**RULING**

*Madise SC JA*

**Background.**

This matter came before me as a single member of the Court pursuant to section 7 of the Supreme Court of Appeal Act hereinafter referred as the Act as read with Order I Rule 18 of the Supreme Court of Appeal Rules, and under the Inherent jurisdiction of the Court. On 16<sup>th</sup> May 2024, the Court granted to the applicant an order allowing him to have his passport released to him on to enable him travel outside the jurisdiction on a business trip on condition that he surrenders his motor vehicle, a GWM P-Series registration number BT 12302 which he bought from Nissan Malawi in 2023 together with all sets of keys and the Registration Certificate to the Registrar of the Supreme Court of Appeal. The applicant was further ordered to report to the Court on his return on

18<sup>th</sup> June, 2024 and surrender the passport back to the State on the said date. The Court further ordered that should he fail to comply without giving valid reasons the attached motor vehicle would stand forfeited to the Government of Malawi. The applicant obtained his passport after surrendering the motor vehicle.

On 25<sup>th</sup> June, 2024, the Court, on application by the applicant, made an Order of extension of time within which to surrender his passport by granting an addition of 45 days within which the passport was to be surrendered. The applicant stated that he had failed to finalise his travel arrangement as he had to go Zimbabwe first in preparation for his trip to Sao Tome . The Court further ordered that the applicant should present himself to the Court within 7 days of the expiration of the said 45 days for further directions of the Court. The 45 days ordered by the Court expired on 10<sup>th</sup> August, 2024. Seeing that there was non-compliance and the State did not move the Court, the Court issued summons *suo moto* to show cause why the motor vehicle which was bonded should not be forfeited to the State. The parties were given 7 days each to file their arguments for and against. On 6<sup>th</sup> August, 2024, it has been submitted that one of the Counsel Edgar Kachere, had to travel to India for emergency medical attention. From India, he had to extend his trip to China where his family gets herbal treatment for his wife's ailments which was not disclosed due to privacy reasons. Hence the failure to present the passport in time.

#### Applicant's response

Counsel for the applicant filed two affidavits and arguments in response not to have the motor vehicle forfeited to the State. The affidavits are similar and the Court will only refer to the affidavit of Counsel E. Kachere. He stated that he had returned from abroad on 16<sup>th</sup> August, 2024, although not in good personal health. That after his arrival, he was in Lilongwe to recuperate as he was still not able or fit to engage in any work for at least a week. That his fellow Counsel, Mr. F. Tambulasi, had also been out of the country, in the Republic of South Africa, from 10<sup>th</sup> August to 22<sup>nd</sup> August, 2024. That notwithstanding, they still made arrangements for the applicant's passport to be surrendered to the Court, taking into account the importance of complying with the said Order. That upon finding out about the availability of the applicant, they found that he also had been down with severe arthritis and been on morphine treatment here in Malawi and he had not reported to Court.

That on 23<sup>rd</sup> August, 2024, a day after Counsel Tambulasi's return to Malawi, the passport was surrendered to the Court by Counsel himself as the applicant was still ill. That the Court Clerk Mr. K. Chimkono duly acknowledged receipt of the passport. However, the motor vehicle was not collected from the Court premises since the applicant, as stated, was not in good health. That as they were preparing the applicant to make an appearance before this Court, after the passport had already been surrendered to the State, they were served, on 28<sup>th</sup> August, 2024, through Robert Lexis Law Firm belonging to Counsel Tambulasi, the notice to show cause *suo moto*, to which this affidavit is responding.

That as Counsel, they admitted that there was delay in surrendering the passport to the State and reporting to the Court. He stated that both Counsel sincerely apologize for this delay. That as explained above, the delay was not on the part of the applicant as he was, although sick, within the jurisdiction. It was because both Counsel for the applicant, were not within the jurisdiction for the reasons explained above. That they know that the applicant has been in the jurisdiction and it is not his intention to disregard any orders this Court may make.

That to show his own commitment to see to it that his case herein and the courts below are duly concluded, he was present at the Principal Magistrate Court (the trial court in this matter) when he and his co-accused were summoned to begin the substantive trial on 29<sup>th</sup> August, 2024. At this hearing, the matter was adjourned to 8<sup>th</sup> October 2024. That as can be seen above, the applicant is ready with the substantive action and ready to comply with this Court's orders, this being the apex Court in this country. That with all the above reasons, the applicant humbly prays to this Court to exercise leniency by not ordering that the motor vehicle bonded herein be forfeited to the Government of Malawi. Rather, the humble prayer is that the honourable Court should make an order that the motor vehicle be duly released to the applicant, the passport having been duly surrendered to the State on 23<sup>rd</sup> August, 2024.

#### Applicant's skeleton arguments

Counsel for the applicant presented one main issue before this Court namely whether the applicant's motor vehicle GWM P series white in color Reg number BT 12302 which was bonded with the Court as a condition precedent to allow him leave the jurisdiction for a business trip to

outside the jurisdiction (Sao Tome) should be forfeited to the State for breaching the condition of his varied bail condition having failed to return his passport at the expiry of 45 days as ordered by the Court. The applicant's main argument is that the principle that substantial justice should be done without undue regard for technicality shall at all times be adhered to in applying the Criminal Code: Section 3 of the Criminal Procedure and Evidence Code. The applicant cited Cropper vs. Smith (1884) 26 QBD 700, where Bowen LJ stated the law in the following terms:

*“Now...it is well established principle that the object of courts is to decide the rights of the parties and not to punish them for the mistakes which they make in the conduct of their cases... I know of no kind of error or mistake which, if not fraudulent...the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy...”*

The applicant further cited Aigbobahi vs. Alfuwa (2006) 6 NWLR (pt. 976) 270 at 294, where Onnoghen JSC stated as follows:

*“Counsel must always bear in mind that...this court has changed from doing technical justice to substantial justice... the courts are enjoined to do substantial justice in relation thereto without recourse to form or technicalities.”*

That in the present case, the applicant, even though he did not comply with the order of the Court as to the return of his passport within the time fixed by the Court owing to his and his Counsel's illnesses and unavailability, he did comply as soon thereafter as he was able to. Not only that, but he has not collected the said motor vehicle from the Court. Again, he is duly taking his trial in the Magistrate's Court. As stated in the supporting affidavits, Counsel Kachere has been going through medical issues that necessitated his travel to India and China. Counsel Tambulasi also happened to have travelled to the Republic of South Africa during the time the passport was to be surrendered. Counsel Tambulasi himself surrendered the passport on behalf of the applicant on 23<sup>rd</sup> August, 2024, before the Court made the Order requiring the applicant to submit as to why the vehicle should not be forfeited to the Government. Counsel for the applicant submitted that the

interests of justice have therefore not been prejudiced at all by the late surrender of the passport and that substantial justice is being done in the criminal case against the applicant.

That applicant therefore truthfully seeks the forgiveness of this Honorable Court for the delay in surrendering his passport, for which he does not claim full innocence. However, the applicant pleads with this Honorable Court to forgive his failure to religiously follow the order of this Court for the reasons given in the affidavits of Counsel. He pleads that this Honorable Court does substantive justice without undue regard to his failings, more so since, as at now, apart from that technical infraction of the Court order, there is now substantial compliance on his part in that the passport is now in the hands of the Court and the applicant's criminal trial is now underway and that the interests of justice have not been affected by the applicant's delay.

Counsel for the applicant now humbly plead and pray that the Honorable Court pardons the applicant's infraction of the Court order to surrender his passport, and that the Court does substantial justice by not ordering the forfeiting of his motor vehicle since his delay has not prejudiced the prosecution of the criminal trial against him, and that otherwise nothing has gone amiss due to his delay. The applicant further humbly prays that the motor vehicle be released to him.

#### The response from the State

In response to the applicant's arguments against the order of forfeiture the State through Counsel I. S Chisanga State Advocate filed an affidavit in which he stated that he was in agreement with the sworn statements made by Counsel Edgar Baxter Kachere and Felix Tambulasi respectively and stated that that in the first application for release of the passport to the applicant, the passport was indeed released to the applicant and there was full compliance to the orders given by the Court. That in the second application for release of the passport to the applicant, the Court granted forty-five days and that at the expiry of the said period, the applicant should return the passport to the State and appear before court for further orders. That there was delay by Counsel to surrender the passport to court or state due to ill health of counsel as explained in their affidavits respectively. That both Counsel have admitted their mistake and have even gone further to apologize to this Honorable Court for their mistake. That the mistake is on the part of Counsel and not the applicant and that this is the first time Counsel have committed the breach or mistake

and that they have taken a step to rectify the mistake. That should be commendable. The State submitted to this Honorable Court that since Counsel have admitted their wrongdoing and that they have apologized to the Court and have taken a step to rectify the problem, this Court should exercise some leniency by not implementing the forfeiture order of the applicant's motor vehicle.

### The Decision

At the expiry of the 45 days the State did not move the Court on the issue of non-compliance. The Court *suo moto* issued summons to the applicant to show cause why his motor vehicle above described should not be forfeited to the State. The Court gave each party 7 days to file their arguments and affidavit for and against. The question before me is whether based on the facts and the law the applicant's motor vehicle should be forfeited to the State. The passport has since been surrendered to the Court. The question at this stage is whether the non-compliance was so substantial as to warrant the fore mentioned sanction?

The lawyers for the applicant stated that the other major factor that contributed to the non-compliance was the illness of lead Counsel Kachere which took him to India and China for medical attention and the unavailability of Counsel Tambulasi who was in South Africa. In my view that notwithstanding Counsel could have advised their client to still report at Court and present his passport since he was in the country. There was no need for the applicant to wait for his lawyers who were outside the jurisdiction. Counsel wrongly advised his client. However this Court cannot punish the applicant for the sins of his lawyers. I hereby warn counsel not to repeat this conduct again.

It is settled law that the main object of courts is to decide the rights of the parties and not to punish them for the mistakes which they make in the conduct of their cases like in the present case. There is nothing that the Court cannot correct. All mistakes can be rectified as long as no injustice is occasioned to the other party. Our Courts do not exist for the sake of discipline and sanction but for the sake of deciding matters which are in controversy. In these premises I order the immediate release of the above described motor vehicle to the applicant and his passport should to be surrendered back to the State. The applicant should therefore present himself before the lower court for the continuation of his criminal trial on 8 October 2024.

I so Order.

**Made** at the Supreme Court of Appeal at Blantyre in the Republic on 17 Sept 2024,



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Dingiswayo Madise SC

Justice of Appeal