IN THE MALAWI SUPREME COURT OF APPEAL
PRINCIPAL REGISTRY

MISCELLANEOUS CRIMINAL APPEAL NO. 6 OF 2013

BETWEEN

KETTIE KAMWANGALA **APPELLANT**

AND

THE REPUBLIC **RESPONDENT**

CORAM: THE HON. MR JUSTICE L P CHIKOPA JA

C Gondwe of Counsel for theAppellant

Salamba Senior State Advocate for the State

Mrs Chintande Court Clerk

RULING/ORDER

INTRODUCTION

On December 17, 2013 we ordered that the appellant be immediately released on bail on conditions that:

1. There be registered with the Road Traffic Directorate a caution against any or any further transfer/dealings in relation to the appellant's motor vehicles Registration Numbers MC 7571 a Mitsubishi Pajero and MC 7175 a BMW unless with the court's express written consent;
2. There be registered a caution against any or any further transaction[s] in relation to the appellant's Plots Number 47/4/958 and 47/4/1030 and any developments thereon unless with the court's express written consent;

3. The appellant surrenders her travel documents to the District Registrar, Lilongwe Registry of the High Court of Malawi;
4. The appellant does not leave the jurisdiction without the consent of the District Registrar of the Lilongwe Registry of the High Court of Malawi; and
5. The appellant surrenders for bail to the Malawi Police Regional Prosecutions Officer Central Region every fortnight on Friday commencing on the Friday next following her release from custody.

We indicated that we would give our reasons therefor at a later stage. Herewith the same.

BACKGROUND

The appellant is one of a group of persons appearing before the courts in relation to allegations of theft of substantial sums of money from the government of Malawi. She has since been committed to the High Court of Malawi Lilongwe Registry for trial on charges of Theft contrary to section 278 of the Penal Code and Money Laundering contrary to section 35(1) (c) of the Money Laundering [Proceeds of Serious Crime and Terrorist Financing] Act. On November 20, 2013 she with others appeared before the High Court Lilongwe Registry seeking an order that she be released on bail. The ruling in respect of such application was delivered on December 3, 2013. For purposes of clarity we feel obliged to reproduce *verbatim* the order of the High Court in respect of such application.

> *'For purposes of allowing investigations to be included I allow that the applicants continue to be in custody for the next 21 days. At the expiry for which the applicants may be released on bail with conditions as follows:*
>
> - *Applicants make full disclosure of all their assets real and personal whose record shall be verified by the prosecution and the assets shall be forfeited on abscondment of bail;*
> - *applicants produce two sureties each surety to be bonded on K2.5 million cash;*
> - *Each applicant shall make a surety bond of K50 million not cash;*

- *Each applicant shall surrender travel documents to the Officer in Charge responsible for prosecutions;*
- *Each applicant shall report to the Officer in Charge responsible for prosecution at the Police Headquarters every Tuesdays of the week before 5.00pm;*

- *None of the applicants shall in any way tamper with the evidence.*

Examination of sureties shall be done by the Registrar'. [**Sic**]

The appellant was not most pleased with the above order. She appealed to this court. The appeal was heard on December 17, 2013. We gave the order referred to hereinabove on the same date.

A MATTER OF INTEREST

The appeal papers, complete with a certification of extreme urgency, were duly served on the respondent through the Directorate of Public Prosecutions on December 12, 2013. We were told by Counsel for the Respondent that for some reason the said papers were stuck in their registry and only came to the notice of responsible officers i.e. Counsel on the morning of December 17, 2013 the date of the hearing. They therefore sought an adjournment to allow them file their affidavit in opposition to the appeal. We refused the adjournment.

Our view has always been that a party is not entitled to an adjournment as of right. They must apply for it and advance cogent reasons in respect thereof. It will then be up to the presiding court to decide on the facts before it whether or not an adjournment should be granted and on what terms if any. Herein the respondent said it was not ready because the documents were stuck in their registry. The respondent was in our view trying to use its own incompetence [over which neither this court nor the appellant have any control] as an excuse for seeking an adjournment. It is, we have no doubt, far from a cogent reason. We did not therefore see it fit to grant the adjournment.

More than that we thought it smacked of disrespect to this court for the respondent to appear before us without even an affidavit verifying the facts in support of their application for an adjournment[not to talk of one in opposition to the appeal itself]. It does not read too well that such kind of conduct is coming from a state law officer and exhibited towards the highest court in the land. We shudder to imagine how the said office regards what might be called lesser courts. For our part let us say that we find such conduct abhorrent. We would ask that henceforth it changes for the better. We would also want to make it clear that we shall not, where the situation demands, hesitate to impose appropriate sanctions in relation to such conduct.

GROUNDS OF APPEAL

1. *The ruling of the learned judge was against the weight of the evidence that was before it;*
2. *The learned judge failed to appreciate that bail being a constitutional right the appellant ought to have been released forthwith in the absence of any tangible evidence that the appellant would have interfered with the investigations;*
3. *The learned judge erred in law and in fact in ordering that the appellant remain in custody for further twenty one days when the Director of Public Prosecutions had not adduced any evidence or made any allegation of inter alia likelihood that the appellant if released on bail would attempt to influence or intimidate witnesses;*
4. *The learned judge erred in law and in fact by imposing strict conditions that the appellant furnish MK50million noncash to the court and produces two reliable sureties to be bound in the sum of MK2.5million each cash which is tantamount to denying bail altogether*'.[**Sic**]

THE LAW

We stated our views about the law relating to bail in the case of **Molosi & Molosi v Republic**. For purposes of the present case we would however want to say as follows:

That whatever might be said elsewhere about bail and the law relating thereto the paramount law still remains the Constitution of the Republic of Malawi. If therefore whatever is said elsewhere runs counter to what the said Constitution provides for the same is invalid to the extent of such inconsistency. See section 5 of the said Constitution.

It should now be trite that where one is detained on account of being suspected of committing an offence [an accused in common parlance] they will be released from custody as of right unless the interests of justice require that such person not be released. Further that it shall be up to the court seized of the matter to decide whether to release with or without conditions.

It is for the State [prosecution] to convince the court on a balance of probabilities that it is in the interests of justice that an accused should not be released from detention with or without conditions.

There is no closed categorisation of what constitutes interests of justice. It is however not in doubt that it is in the interests of justice that a matter be disposed of without unnecessary delay, that an accused does not interfere with witnesses and/or investigations, that an accused always attends court for trial on all set days, times and places, that an accused does not benefit from the proceeds of crime and that a complainant's interests in stolen property are as much as possible protected.

That where a court imposes conditions on an accused's release the same should be clear, practical, bear some relationship to the proven interests of justice and should not amount to an effective denial of bail.

THE PARTIES' ARGUMENTS

THE APPELLANT

The grounds were argued in an omnibus fashion. As we understood her the appellant contends that the High Court erred in having granted her bail further ordering that the appellant should stay in custody for a further 21 days before she could be released from custody. In her view such order is without merit at law and in fact. There was no proof that she would interfere with investigations and/or witnesses. Or that she was a flight risk. In her view there were at most general allegations that investigations were not over which cannot and should not be the basis for continuing to keep her in custody.

She also had issues with the conditions on which bail was granted. In her view they are unduly punitive and tantamount to a denial of bail.

For her, the High Court, in deciding whether or not to immediately release her, should only have asked itself the question whether or not she would at all times attend court for trial. The answer in her view would have been in the positive in which case she should immediately have been released on bail. She therefore prayed that the High Court's order herein be set aside and that in place thereof we give one that results in her immediate release on reasonable conditions.

THE RESPONDENT

Like we have said above, the Respondents did not file any affidavit in opposition. We in accordance with our understanding of the law therefore allowed them to only comment on matters of law as opposed to those of fact. They were thus content to say that, much as they agreed with the argument that the State should do more than allege unfinished investigations, this was a proper case in which the interests of justice decreed that the appellant should continue being in custody. That would allow the State to complete its investigations into the matters alleged against the appellant. Further that the conditions imposed by the High Court were not in any way punitive, inappropriate or effectively equal to a denial of bail. They were appropriate according to the facts of this case. Any comparisons with similar

cases were therefore misplaced seeing as each case should be decided on its own facts. The respondent prayed that we maintain the High Court's order.

THE ISSUES AND THE COURT'S CONSIDERATION THEREOF

In our view there was only one issue before the court. This is namely whether or not to release the appellant on bail. And in keeping with the law the High Court should have asked itself one and only one question namely: whether or not it was in the interests of justice that the appellant continues to be in detention. That is a question that demanded a yes or no answer. If the answer was in the positive the High Court was bound to remand the appellant in custody on such terms as it deemed fit. It was of course open to the appellant to henceforth make further applications for release on bail. If however the answer was in the negative the High Court was equally bound to order the release of the appellant from custody. It was also up to the said court to do so with or without conditions. In accordance with what we have said hereinabove, such conditions should have been those that bore some relationship to the interests of justice raised and proven in the case, were practical, clear and did not amount to a denial of bail. So, that if there was the possibility that the appellant would escape the jurisdiction the conditions should have been such that would make it difficult, impossible or unattractive for her to so escape. In the alternative, the conditions should have been such that would make it easy to recapture her if she indeed escaped. Such conditions would for instance be the retention by the court or law enforcement agencies of her travel documents, an appropriate reporting regime and sanctions that would be triggered on her escape from this jurisdiction. Similarly if the fear was that she would interfere with investigations and/or witnesses the condition[s] would be tailored in such a way as to make sure she does not do that. Or that if she did the court would know. She could thus be barred from getting in touch with witnesses potential or actual or from the investigative process itself. Or, doing anything that might in the view of the court interfere with witnesses and/or investigations. If the concern was that she might dissipate the assets the proceeds of the alleged crime, the conditions would be one[s] that would preserve, for the duration of the trial, the said assets.

Applying the above to the instant case, we observed with concern that the High Court does not seem to have decided which side of the scales of justice weighed heavier. We expected it to say clearly either that the interests of justice decreed that the appellant should continue being in detention in which case the appellant would have continued stay in detention. Or that there were no interests of justice militating against her release in which case the appellant would have been released with or without conditions. However, by on the one hand granting bail [in other words saying the interests of justice did not warrant a continued detention] still ordering that the appellant continues to stay in detention for a further 21 days the High Court was standing on the fence. It was in one breath saying that there was no basis for keeping the appellant in detention [in other words that she should be released] while on the other hand ordering her continued stay in detention. Saying at one and the same time that there were and there weren't justice interests militating against her release from detention. As clear cut a case of judicially sanctioned illegal detention as there will ever be. In our judgment the court should have made one clear cut decision. Either to say there were no interests of justice militating against the appellant's release on bail and proceed to release her with or without conditions or to say there were such interests and proceed not to release her. Not both. To the extent that it prevaricated it fell into error.

It was suggested that the 21 days continued detention could or should be construed as a condition on which the release from detention was granted. It cannot be. It is as much a physical impossibility as it is a legal one. A court cannot and should not order the release from detention on condition that the detainee continues to be in detention. It is equivalent to granting bail on condition that the same is ungranted. It results in an obvious farce. An absurdity that is in our humble view worse than the much quoted saying of giving with one hand and taking away with the other. The conclusion is inescapable. The High Court erred when it purported to grant bail but still kept the appellant in custody for a further 21 days.

Much was said about incomplete police investigations. Whether they can be the basis for a denial of bail. Speaking for ourselves we believe that law enforcement should only effect an arrest when they have evidence of more than mere suspicion

of criminality. We also believe that such evidence should only be the product of investigations. Where there is no investigation there cannot, we believe, be any evidence. Where there is no evidence it would seem only natural that there should be no arrests. We therefore find it rather perverse that law enforcement should arrest with a view to investigate. Or that they should object to a release on bail merely because they have not completed investigations. It calls into question the very acts of arresting and detaining a person. It also raises the question whether or not law enforcement will benefit from their own incompetence. Accordingly, in our view the courts should be slow, very slow to refuse to release a detainee just because law enforcement has not completed investigations. Proceeding otherwise would lead to abuse of the right to liberty. People would be detained or continue to be in detention on the basis of pending or incomplete investigations when there were in fact none. Law enforcement would be tempted to slow down investigations with a view to keeping accused persons in custody longer. We would therefore rather the law were interpreted in such a way that arrests and detention followed investigations. That way liberty would, in appropriate cases, then be withheld not because investigations were not complete but because they would not be properly completed with the accused at liberty. Or that there would be interference with witnesses/investigations. In not permitting the immediate release of the appellant in order to, in the absence of evidence of possible interference with investigations/witnesses, allow the police to complete investigations the High Court in our judgment also erred.

The appellant also raised issues with the conditions of bail. It was argued that they were unduly punitive. That they were in fact tantamount to a denial of bail. Wequickly remind ourselves that conditions of release should bear some relationship to the proven interests of justice, be clear, practical and should not effectively be equal to a denial of bail. The question being whether the conditions imposed by the High Court were such. Matters in this court proceed by way of rehearing. We essentially ask ourselves the question whether on the facts, arguments and law before the High Court we would come to a different conclusion. If we therefore go to the respondent's affidavit filed in the High Court only the small matters of interference with witnesses and the jumping of bail were raised [but not necessarily proven in our view]. The High Court should in our view

therefore have busied itself with imposing only those conditions that made it difficult, impossible and/or unattractive for the appellant to either jump bail or interfere with witnesses/investigations. However, and not disregarding what we have said hereinabove, we think that beneath every criminal trial is the need for the accused person to attend trial on all set days, times and places. It is a cardinal point[but certainly not the only one] therefore that whatever conditions attach to an accused's release from detention they should specifically emphasise those that ensure that the accused finds it difficult, impossible or unattractive to miss court or escape the jurisdiction. In the alternative those which make it attractive for the accused to attend court.

There was a suggestion that the 21 days hereinabove mentioned was a condition on which the appellant was released. We have said something about this hereinabove. And it is to the effect that such a condition is untenable. Having ordered the restoration of the appellant's liberty the High Court could not have validly set as a condition therefor an act that took away the liberty so granted. That in other words ungranted the bail. Such a condition is one that has the effect of denying bail. The High Court fell into error.

There were also conditions that bound the appellant and her sureties in monetary terms. One bound the appellant in the not cash sum of K50,000,000. Another bound her two sureties in the cash sum of K2,500,000 each. On the face of it there is nothing wrong with the conditions. They seem to be the tough conditions which would dissuade an accused from jumping bail or which would in case of abscondment allow the State to recover the sums of money allegedly stolen by the accused. But there is clearly something wrong about them. To begin with the sums allegedly stolen and/or laundered by the appellant totalled K28,000,000. And yet here was the appellant being asked to effectively commit herself to the tune of K55,000,000. Being put in a situation where she stood to lose K55,000,000. That was more than enough to cater for any loss the State would incur if she absconded. The State would in fact make a profit if the conditions were breached. And that is not the essence of bail conditions. The conditions also required the appellant to fully disclose her assets real and personal. These would be forfeited if she jumped bail. Such forfeiture would be in addition to the monetary conditions. The sum

effect of the monetary conditions is way beyond the K28,000,000 in issue herein. The monetary conditions in our judgment bore no reasonable relationship to the engaged interests of justice which was to secure the K28,000,000 allegedly stolen and the appellant's presence at court. They effectively amounted to a denial of bail. The High Court thereby erred. If we may, let us show why/how the High Court got itself into this quagmire. Firstly, the High Court approached all applicants before it in identical fashion as if they were one accused. It erred. The correct way was to deal with the applicants by adopting a uniform approach. The sums allegedly stolen/laundered varied from applicant to applicant. It ranged from K28,000,000 in respect of which the appellant was charged to K355,000,000.Because the High Court dealt with the applicants in identical fashion it imposed identical conditions in respect of these vastly varying sums. That was to err. Had it adopted a uniform approach it would have looked at each set of facts, applicant and inquired into what was appropriate to protect the interests of justice in a particular case. Had the High Court done so it, we have no doubt, would have come to the conclusion that whereas it might be proper to protect the interests of justice in proceedings where the sum of K355,000,000 is in issue with a noncash bond of K50,000,000, a cash bond of K5,000,000 and the possible forfeiture of all of an applicant's assets the same might not be the case in relation to an applicant who was arraigned in relation to K28,000,000.Secondly the High Court seems to have misapprehended two important principles. On the one hand it seemed to conceive of monetary conditions of bail as some commercial transaction where the accused paid in cash or was bonded in return for his liberty. That is not as it is. The cash or noncash bond is given to ensure the accused's attendance at trial. The down side of such misconception is that the bond, cash or otherwise, tends to be set unreasonably high. This is due to the high premium we invariably [and subconsciously] set on an individual's liberty. If we however look at the bond as a means of ensuring the accused's presence at court the question always remains 'what in the circumstances is reasonable to secure an accused's presence at court?' and not the cost of one's freedom. On the other hand the High Court seems to have been moved more by the sums, the subject of the criminal accusations, rather than the accused persons' means. The High Court did not even examine the appellant's means. Whatever was set as the monetary bond was

therefore arbitrary. It was not reflective of the appellant's ability to pay or issue the noncash bond. And that is not as it should be.

On a different plane it is vital that bail conditions should not just be practicable but also sufficiently exact in so far as the wording is concerned. The wording used should leave no one in doubt as to what is expected of not just the accused but also the prosecution. With respect, the High Court fell somewhat short of the requisite standard on that score. It was thereby possible for the grant of bail to turn it into some charade/farce. We have hereinabove quoted in *extenso* the conditions. Therein the High Court said the appellant 'may be released' on bail after the expiry of 21 days. These words clearly raise the possibility that the appellant may not be released on bail even after the expiry of 21 days. The question arises as to what exactly was meant to trigger the appellant's release at the expiration of the 21 days. Was there need for another application? Would she be released without further ado upon meeting the stipulated conditions? If there was to be need for further action, whose action was it to be? It is, we are sorry to say, an imprecision of language that has the capacity to turn any grant of bail into an illusion. Or a cause for needless further litigation. Then there is the condition as to the disclosure of assets by the appellant. The condition requires on the one hand the appellant to disclose and on the other for the prosecution to verify before it can be deemed to have been satisfied. That is far from a desirable or practicable scenario. If we may at what point for instance shall it be deemed that the prosecution has verified the list of assets? Will they be required to conduct their own investigations? If yes for how long? And where would the appellant be while the State went about verifying the assets? In custody? Whichever way one looks at it the verification process ordered by the High Court is prone not just to disputes but also abuse. It is not difficult to envisage a scenario where the prosecution draws out the verification process just to frustrate the bail process. We understand that the High Court might have been troubled by the spectre of under disclosure. The better way forward though would have been for the court to allow the prosecution to at any time challenge the asset disclosure for under disclosure if they have evidence of the same. Provided that as long as the alleged under disclosure remains unsuccessfully challenged the appellant will be deemed to have fully disclosed her assets. Then there is condition number 4. The appellant

is supposed to surrender travel documents to **the Officer in Charge responsible for prosecutions** [our emphasis]. Who exactly is this officer? It is again not difficult to envisage the appellant being tossed from office to office with no one willing to own up and accept that they are the officer or office that the High Court had in mind when it made the order. Much the same might be said in respect of condition number 5. It makes reference to **the Officer in Charge responsible for prosecutions at police headquarters** [our emphasis]. Is this officer different from the one in condition number 4? Or is it one and the same person? If the officer/office is the same why then is the description at variance? This loose use of language may make it impossible for it to be said with certainty as to what was expected from the parties. It is our considered judgment that the foregoing conditions may instead of facilitating a release on bail achieve quite the opposite. To that extent the High Court erred.

CONCLUSION/DISPOSITION

The appellant prayed that we set aside the High Court's order and substitute therefor one that will result in her immediate release from detention on whatever conditions if any we may deem fit.

We have above demonstrated how the High Court fell into error. We therefore granted the appellant's prayer. We set aside the High Court's order and immediately released the appellants on the conditions set out hereinabove. A word or two about the conditions.

First, a restatement of the law. It was contended by the appellant that the only consideration in deciding whether or not to release an accused on bail is whether or not she will attend trial. That is not true. Yes it is an important consideration. It is however not the only consideration. It is possible to deny bail even where it is clear the accused will attend trial if there is proof to the requisite standard that the accused will once at liberty interfere with witnesses and/or investigations. The truth of the matter is that the only question a court should ask itself in deciding whether or not to grant bail is whether or not the interests of justice militate against a release on bail. If they do no release will be allowed. If they do not the

accused will be released on bail. The issue of the accused attending trial or not, interfering with witnesses and/or investigations are only considerations that will be taken into consideration in answering **the** question before the court. In the instant case the High Court decided to grant bail. It means in our judgment that there were no interests of justice militating against a release. On the facts before this and the court below we have to agree. There was no evidence that the accused would not attend trial or would interfere with witnesses and/or investigations or indeed dissipate the assets the subject of the prosecution herein. The release was immediate.

The next question is whether the release should be with or without conditions. The High Court thought conditions should be imposed. Again we agree. It is the actual conditions we disagreed with. The question therefore being what kind of conditions should be imposed. We need to look at the accused, what interests of justice are engaged, the allegations against the accused and the essence of a criminal prosecution. Accordingly it is obvious that for a trial to take place the accused needs to attend court for trial at all set times, dates and places. It makes sense therefore that we have a condition or conditions that ensure that the accused is prevented and/or discouraged from escaping the jurisdiction. It is for that reason that we ordered that the appellant should surrender her travel documents to the District Registrar, Lilongwe Registry of the High Court of Malawi; that she should report for bail to the Police Regional Prosecutions Officer responsible for the central region of Malawi every Friday commencing the Friday next following her release from custody; and not to leave the jurisdiction without the permission of the said District Registrar.

We also noted that this case is essentially about the appellant unjustly enriching herself. If she is convicted the trial court might consider resorting tothe appellant's assets in order to recompense the complainants. It is imperative in our view that whatever property the appellant now has should be preserved for that eventuality. There have in the past been examples of this being done. The case of **Jeffrey v Jeffrey** immediately comes to mind. Therein *inter alia* cars were actually impounded. By the time the case was resolved the same had deteriorated they were not fit for purpose. Either for compensation or return to the accused.

We took a slightly different tack herein. We did not impound any assets. We instead decided to tie the appellant's known assets to the life of the criminal proceedings against her. That way an appropriate decision would then only be made at the conclusion of the prosecution. We therefore decided to register the State's possible interest in the appellant's assets. Accordingly we ordered that cautions be registered against dealings in relation to the appellant's motor vehicles and real property namely motor vehicle registration numbers MC7571 Mitsubishi Pajero and MC 7175 BMW and Plots Numbers 47/4/958 and 47/4/1030 and any developments thereon in the manner set out hereinabove.

We so ordered.

Dated this 28th day of January 2014at Blantyre.

L P CHIKOPA

JUSTICE OF APPEAL