

Kettie Kamwangala v the Republic (2013)

MSCA Miscellaneous Criminal Appeal No. 6 of 2013

Court:	Supreme Court Of Appeal
Bench:	The Honourable Justice L.P Chikopa SC JA
Cause Number:	MSCA Miscellaneous Criminal Appeal No. 6 of 2013
Date of Judgment:	January 28, 2014
Bar:	C Gondwe, Counsel for the Appellant Salamba Senior State Advocate for the State

Head Notes

Constitutional Law -Fundamental Rights – Right to Liberty – Bail – Constitution, s 42(2)(b) – Detention requires compelling interests of justice.

Criminal Procedure -Bail – Conditions – Conditions must be practical and not amount to an effective denial of bail.

Criminal Procedure - Bail – Detention as condition – Ordering continued detention after granting bail is a judicial error and a legal absurdity

Criminal Procedure -Bail – Investigation – Incomplete investigations alone are insufficient ground to refuse or delay release on bail.

Criminal Procedure -Bail – Conditions – Monetary bond must bear relationship to purpose, not be punitive or a source of profit for the State.

Summary

The Appellant appealed to the Malawi Supreme Court of Appeal, Principal Registry, against an order of the High Court, Lilongwe Registry, concerning her application for bail. The Appellant was one of a group of persons committed to the High Court 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 Act**. The High Court had ruled to grant bail but, simultaneously, ordered the Appellant to remain in custody for a further 21 days to allow for the conclusion of investigations. Furthermore, the High Court imposed stringent conditions, including a surety bond of **K50 million** (non-cash) for the Appellant, two cash sureties of **K2.5 million** each, and full disclosure of assets for forfeiture upon abscondment.

The principal legal questions were whether the High Court erred by ordering continued detention after granting bail and whether the bail conditions were unduly punitive and amounted to an effective denial of the Appellant's constitutional right to liberty. The Court allowed the appeal, setting aside the High Court's order and substituting its own order for the immediate release of the Appellant on revised conditions. The Court found that granting bail while ordering a further 21 days of detention was a "judicially sanctioned illegal detention" and an inherent absurdity, as a court cannot order liberty conditional upon continued detention. The Court also held that incomplete police investigations alone should not be a basis for denying bail and cautioned that detention must follow investigations, not precede them. Crucially, the monetary bail conditions were found to be punitive and to amount to a denial of bail, noting that the sum of K55 million was substantially higher than the K28 million allegedly stolen, which would effectively allow the State to profit upon a breach. The Court directed that the Appellant be immediately released subject to conditions, including cautions on her specified motor vehicles and plots, surrender of travel documents, restrictions on

leaving the jurisdiction, and fortnightly reporting to the Malawi Police Regional Prosecutions Officer.

Legislation Construed

Constitution of the Republic of Malawi (s 5, s 42(2)(b))

Statutes

Money Laundering [Proceeds of Serious Crime and Terrorist Financing] Act (s 35(1)(c))

Penal Code (Cap. 7:01) (s 278)

Judgment

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 | 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:

- a. 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;
- b. Applicants produce two sureties each surety to be bonded on k2.5 million cash;

- c. Each applicant shall make a surety bond of K50 million not cash;
- d. Each applicant shall surrender travel documents to the Officer in Charge responsible for prosecutions;
- e. Each applicant shall report to the Officer in Charge responsible for prosecution at the Police Headquarters every 5.00pm; Tuesdays of the week before
- f. 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

