

John Zenus Ungapake Tembo and others v The Director of Public Prosecutions

Summary

Court:	Supreme Court Of Appeal
Bench:	The Honourable Justice J Kalaile SC JA , The Honourable Justice Villiera, JA, The Honourable Justice Unyolo SC, JA
Cause Number:	MSCA Criminal Appeal Number 16 of 1995
Date of Judgment:	September 11, 1995
Bar:	Stanbrook, Queen's Counsel, For the Appellants, Counsel George Kaliwo, For the Appellants, Counsel Gustav Kaliwo, For the Appellants,, Counsel Munlo, SC, For the Appellants Counsel I N K Nyasulu, For the Respondent, Counsel Mwenelupembe, For the Respondent

The Appellants appealed to the Malawi Supreme Court of Appeal against a High Court decision delivered on 31 May 1995 dismissing their application for bail. The three Appellants were arrested in January 1995 in connection with the 1983 deaths of three Cabinet Ministers and a Member of Parliament and were committed for trial on charges of murder and conspiracy to murder. Their initial

application for bail was refused by the Chief Resident Magistrate for lack of jurisdiction. A subsequent application to the High Court was refused by Mwaungulu, Acting J., who nonetheless ordered that if the case was not ready for hearing by 24 April 1995, the Appellants should be released on bail.

As the case did not commence by the appointed date, a fresh application for bail was brought before Mkandawire, J., who dismissed it, arguing that the prosecution was not wholly to blame and that no "exceptional circumstances" had been shown. Following an order for severance, the prosecution elected to proceed only on the lesser, non-capital charge of conspiracy to murder. The final application for bail was dismissed by Mkandawire, J., on the grounds that severance of the charges did not constitute a fresh matter that would permit him to revisit the earlier ruling. The Court allowed the appeal, finding unanimously that this was a proper case in which bail ought to have been granted to the Appellants. The decisive rationale was that section 42(1)(e) of the Malawi Constitution creates a right to bail for everyone, subject only to "the interests of justice." The Majority affirmed that the onus of proof is on the State to show why an accused should be deprived of this right, noting that the likelihood of the Appellants absconding was remote. The Court further held that the severance of the indictment to the non-capital charge of conspiracy to murder constituted a new situation and a proper basis for a fresh bail application under the Criminal Procedure and Evidence Code. The prolonged pre-trial detention of nine months for a case that was clearly going to be a long trial was also a crucial factor. The Court pronounced the decision orally in open Court, granting the Appellants bail on specific conditions involving a bond, sureties, and daily reporting. The Court made no order as to costs