



REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

CRIMINAL APEAL NUMBER 02 OF 2025

(Being High Court, Criminal Division, Principal Registry Homicide Case No. 63 of 2019)

Between

PHILLIP VOETS

APPLICANT

And

THE REPUBLIC

RESPONDENT

CORAM: HON. J. N. KATSALA SC., JA

I. Banda, of counsel for the applicant

Mrs. Masiku, State Advocate for the respondent

Mrs Chintande, Recording Officer

RULING

1. The applicant is seeking an order of this Court directing that his appeal against his conviction on a charge of murder be heard despite the fact that some pages are missing from the record of appeal. The application is made under Order IV, rule 2 of the Supreme Court of Appeal Rules and is supported by an affidavit sworn on 12 January 2026 by counsel Patrick Calvin Kalimbuka of Messrs Maele Law Practice who has the conduct of the matter on behalf of the applicant.
2. Briefly, the background to the application is that the applicant was charged in the court below with the offence of murder contrary to section 209 of the Penal

Code. It was alleged that on or about 21 May 2019, at Chirimba Township in the district of Blantyre, with malice aforethought he caused the death of his wife, Elizabeth Khozi Voets. He was convicted after a full trial and was sentenced to imprisonment for a term of 20 years. He is dissatisfied and has since appealed to this Court against both the conviction and the sentence. However, he says that the record of appeal that has been prepared has some pages missing, that is, pages 143 – 176 inclusive. During the hearing of this application, counsel advised the Court that the record of appeal is missing the evidence of three witnesses, that is, the evidence of a Pathologist, Doctor Charles Dzamalala who was the prosecution’s witness number three (PW3), the evidence of Mr Dan Khozi, who was defence witness number 4 (DW4), and the evidence of Professor Jack Wilima who was defence witness number five (DW5). It is the applicant’s contention that despite the missing evidence, he feels that it will not result in a miscarriage of justice if the appeal is heard and determined because the missing evidence is not substantial and is inconsequential. Further, it is contended that since the court below in its judgment under appeal captured all the evidence that the witnesses gave to the extent that one is able to follow all the evidence which was given in court and how the court analysed it, the hearing and determination of his appeal will not be compromised due to the missing pages of the record. As such, the applicant wants this Court to order that his appeal should proceed to hearing despite the missing pages of the record.

3. The applicant has cited the case of *Andrew Morris Chalera and 2 others v Republic* MSCA Criminal Appeal Number 5 of 2012 (unreported) and has referred specifically to page 8 of the judgment where this Court said:

“What we make of the scanty precedent that we have been able to scout is that a court of appeal will weigh the degree, extent and relevance of the part of the record missing and cannot be reconstructed. Where the missing part of the record is not substantial, immaterial and inconsequential as would not result in a miscarriage of justice, the appeal shall be proceeded with and finally determined. Where the missing part of the record is substantial, material and consequential, such that proceeding with the appeal would result in injustice, the conviction should be set aside without the full appeal being heard.

Where the conviction is set aside it behoves the court of appeal to consider whether that be the end of the matter or, where the interests of justice so require, to order the appellant to be retried. Whether an order for retrial should be made will depend on the circumstances of the individual case.”

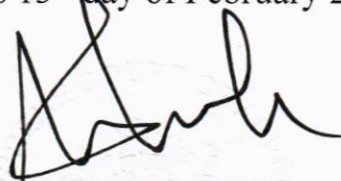
4. Having considered the material before this Court and the arguments advanced by the applicant, I find that the application must fail. It is my judgment that the application is rushed and somehow casual. The applicant has not said what has happened for the 35 pages of evidence to miss from the record of appeal. There is no mention of what efforts have been made to trace the missing pages or indeed why the evidence cannot be transcribed again from the shorthand note of the proceedings maintained by the court reporter. Further, there is no mention of what the court below, which is responsible for the preparation of the record of appeal, has done to trace or reconstruct the missing pages.
5. Also, Order IV, rule 9 (1) of the Supreme Court of Appeal Rules prescribes what a record of appeal should contain where the court below was exercising its original jurisdiction in a criminal matter. It provides that where a transcript of the shorthand note of the proceedings is not available, the Judge’s notes should be included in the record of appeal. In the present application, the applicant has not said why the Judge’s notes on the missing evidence have not been included in the record of appeal to fill in the gap.
6. The facts and circumstances in the case referred to by the applicant in support of his application are significantly different from those in the present matter. In that case, the appellants were charged with murder. The evidence of the prosecution hinged mainly on the identification of the accused persons. One of the witnesses positively identified the first appellant but was not asked to identify the other two accused persons. All the accused were found guilty of murder by a jury and were duly convicted and sentenced to death. At the hearing of their appeal, it transpired that the record of appeal was incomplete. The summing up to the jury by the trial judge was not part of the record and all efforts to trace it had failed. Thus, the Court had to determine, as a preliminary issue, what becomes of appeals in such circumstances - and came up with the dictum reproduced above.

7. In order to put the dictum in its proper context, it must be mentioned that the Court found that the case against the other two appellants was founded on circumstantial evidence. As such, much depended on who the jury believed as between the investigators and the appellants, and also on the directions the judge gave to the jury including his expression of opinion on the facts, the caution statements and the demeanour of the witnesses. As such, a vital part of the record was missing and it would not be possible for the Court to determine the appeal in the absence of a reconstruction of the missing part. Considering that it had been thirteen years since the trial, the Court held that chances of reconstruction of the missing part were virtually too remote. It would have been difficult for the trial judge to recall what he said to the jury and reconstruct his summation as close as possible to what he actually said. Consequently, the Court held that it would be inappropriate, in the circumstances, to order a retrial of the appellants and proceeded to release them.
8. In the instant case, I am aware that the trial in the court below was before a judge sitting alone and that the judgment appears to be detailed on the witnesses' testimony, among other things. However, in light of what has been said hereinbefore, inter alia, that there is still a lot that can be done to recover or reconstruct the missing pages of the record of appeal, I find that it would be too early and also baseless for this Court to hold that the part of the record that is missing cannot be reconstructed and that the appeal should be heard and determined on the basis of what is available in the judgment. In the same vein I find that it would be premature and a miscarriage of justice if this Court were to consider whether to set aside the conviction without the full appeal being heard.
9. Further, from the judgment below, it is clear that some of the missing pages contained the evidence of the pathologist which was adduced with the intention of establishing the cause of the death of the deceased. The evidence contradicts the appellant's version of the cause of the death of the deceased. And it would appear that Professor Jack Wilima is the physician that attended to the deceased when she was taken to Mwaiwathu Private Hospital for medical attention and his testimony related to, inter alia, the treatment that was given to the deceased and her cause of death. In my considered judgment, such evidence cannot be hastily dismissed as not substantial and or

inconsequential especially considering the fact that, in his appeal (as per the grounds of appeal), the applicant is vigorously challenging the Judge's assessment of the evidence and her findings of fact on the evidence as a whole and specifically on the evidence of Doctor Dzamalala and Professor Wilima, which is missing from the record. In my opinion, since appeals in this Court are by way of rehearing, it would be important that this Court must have the opportunity to appreciate and assess how these witnesses, whose evidence is missing from the record, fared in their testimony especially during cross examination.

10. Lastly, but certainly not least, Order IV, rule 8 of the Supreme Court of Appeal Rules gives the responsibility of preparing the record of appeal in criminal appeals to this Court to the Registrar of the court below. It is my view that it is the court below which should do everything possible to ensure that the record of appeal is complete. Where it is not possible to have a complete record, the Registrar of the court below must indicate so and give the reasons and the efforts made to rectify the defect. In the instant case, there is nothing from the Registrar of the court below on the missing pages of the record and I am very surprised how he/she could proceed to file the record in its incomplete state without any report to that effect.
11. In the circumstances, and for the reasons I have given, I refuse to grant the application. It is my view that the missing parts of the record of appeal can be recovered or reconstructed if the Registrar of the court below makes an effort. Therefore, I order that the record of appeal in this appeal be returned to the Registrar of the court below to resolve the issue of the missing pages. I so order.

Pronounced at Blantyre this 13th day of February 2026.



J.N. KATSALA SC

JUSTICE OF APPEAL