



Republic of Malawi

IN THE SUPREME COURT OF APPEAL

CIVIL APPEAL NUMBER 13 OF 2023

(Being Civil Cause No. 144 of 2019 High Court, Lilongwe District Registry)

BETWEEN

YOYOLANI KAPINGASA (Suing on his own behalf
and on behalf of Y) APPELLANT

AND

ATTORNEY GENERAL (Kamuzu Central Hospital)RESPONDENT

CORAM: HON. DEPUTY CHIEF JUSTICE L.P. CHIKOPA SC.

HON. JUSTICE F.E. KAPANDA SC., JA

HON. JUSTICE H.S.B. POTANI SC., JA

HON. JUSTICE J.N. KATSALA SC., JA

HON. JUSTICE I.C. KAMANGA SC., JA

HON. JUSTICE M.C.C. MKANDAWIRE SC., JA

HON. JUSTICE S.A. KALEMBERA SC., JA

HON. JUSTICE R. MBVUNDULA SC., JA

HON. JUSTICE D. KAMANGA SC., JA

E.S. Mlenga and L. Mambutwa, of counsel for the appellant.

N. Chisiza and M. Shumba, of counsel for the respondent

Shaibu and Tchukambili, Judicial Research Officers

Chinkono and Fundani, Court Interpreters

Pendame and Banda, Court Reporters

JUDGMENT

Katsala SC., JA (All other Justices of Appeal concurring)

1. This is an appeal against an award of damages made by the Assistant Registrar in the court below sitting at Lilongwe District Registry. The appeal is limited to the assessment of damages since liability was conclusively established by a default judgment.
2. The brief facts of the case are that on 14 February 2019, the appellant, who was the claimant in the court below, took out an action on his own behalf and as legal guardian for his minor child, Y, against the respondent claiming damages for pain and suffering, loss of amenities of life, disfigurement, and the costs of the action following the negligence on the part of medical practitioners at Kamuzu Central Hospital, in Lilongwe, when treating his child's broken arm injury which degenerated and resulted in amputation of the arm above the elbow. The respondent failed to enter a response or file a defence against the action and on 9 July 2019, the Assistant Registrar entered a default judgment for damages to be assessed. The matter proceeded to assessment of damages and in her ruling delivered on 22 January 2021, the Assistant Registrar awarded a total sum of K10,000,000 as damages. This award was broken down as follows: - K4,500,000.00 for pain and suffering, K2,500,000.00 for loss of amenities of life, and K3,000,000.00 for disfigurement.
3. The appellant was aggrieved by the award and filed a Notice of Appeal to this Court on 9 March 2021, raising two grounds of appeal, namely: -
 - i. The learned Assistant Registrar erred in law in disregarding the comparable cases cited before the Court without giving any justifications; and
 - ii. The learned Assistant Registrar erred in law in relying on a case authority which was not analogous to the case before the Court.

4. At the hearing of the appeal it transpired that the appellant filed the Notice of Appeal out of time. He filed it a day after the period that the law prescribes for filing of notice of appeal. When quizzed on this point, counsel for the appellant conceded that indeed the notice of appeal was filed out of time.
5. Section 23(1)(b) of the Supreme Court of Appeal Act prescribes the periods within which a person who intends to appeal to this Court must give notice of such intention. The section provides as follows: -

“(1) If a person desires to appeal under this Part from the High Court to the Court, he shall, in such manner as may be prescribed by rules of court, give notice to the Registrar of the High Court of his intention to appeal—

(a) within 14 days of the judgment from which he wishes to appeal if such judgment is an interlocutory order;

(b) within six weeks of the judgment from which he wishes to appeal in any other case.

(2) The Court may extend the time for giving notice of intention to appeal under this Part, notwithstanding that the time for giving such notice has expired.”

6. The law on this point is clear. Where an appeal is filed out of time, there is no competent appeal before this Court. Commenting on this subject in *Prince Henderson v Republic* Criminal Appeal No. 1 of 2023 (unreported) this Court said:

“The law is very clear; where a notice of appeal has been filed out of time, and without an order of the Court extending the time within which to appeal, there is no appeal. In *Chiumbu v Republic* [1978-80] 9 MLR 87 at p. 89 Mead, J cited with approval the English case of *R v Lesser* [1939] 27 Cr. App. R. 69 p 71 where Humphreys, J said:

‘There appears to be a danger of the rules which govern the proceedings of this Court being regarded as of no importance. The Court has listened to repeated applications for extensions of time for leave to appeal, which have been put forward as if granting of such applications were a mere matter of form. While the Court is always willing to listen to such an application ... it should be clearly understood that a person who has failed to appeal within the ten days allowed by statute has lost his right of appeal.’ (Emphasis supplied)”.

7. The appellant lost his right to appeal when the prescribed period for appeal expired. In *Malawi Housing Corporation v Edwin Nyirenda* Civil Appeal No. 26 of 2022 (unreported) this Court held that the period a person aggrieved with a judgment is allowed to appeal is by all standards a very long time as far as the successful litigant is concerned. The uncertainty on whether there will be an appeal or not can be stressful. As such it is both unfair and unjust to keep a successful party in such suspense beyond the period prescribed for filing an appeal except where there are good and substantial grounds which would justify an extension of the period within which to appeal.
8. In any case, there is really no need for a litigant who intends to appeal to wait till the last day to file the notice of appeal. They need to make up their mind in good time within the six weeks prescribed by the law. It would be advisable to proceed with speed. That is why Order III, rule 4 of the Supreme Court of Appeal Rules demands that an appellant who seeks an extension of the time within which to file an appeal must show good and substantial reasons for the failure to appeal within the prescribed period, otherwise the application should be declined.
9. In our view, it does not matter that the appellant herein was out of time by a single day only. Section 23(1)(b) of the Supreme Court of Appeal Act, being a statutory provision, must be applied in its fullness. As such, this Court should not be asked or expected to turn a blind eye to the default and proceed to hear the appeal on the merits on the ground that the delay in appealing is minimal. A breach of the statutory provision cannot be obliterated or waived by the court. The law must be applied to the letter. Non-compliance with a statutory provision must be differentiated from non-compliance with other ordinary prescriptions, where a

court may have the discretion to waive the non-compliance or not. In the latter case, the court can, on the facts, exercise its discretion to allow proceedings to continue despite a default. There is no question of discretion in the instant matter. Consequently, regardless of how depressing the result may seemingly be, the law must be applied to the letter.

10. In the premises, there is no competent appeal before this Court. We cannot proceed to the merits of the appeal. The matter is dismissed. We make no order as to costs because the respondent defaulted on the procedural protocols of this Court.

Pronounced at Lilongwe this 5th day of November, 2025.



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Hon. Deputy Chief Justice L.P. Chikopa SC.



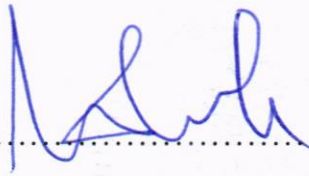
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Hon. Justice F.E. Kapanda SC., JA



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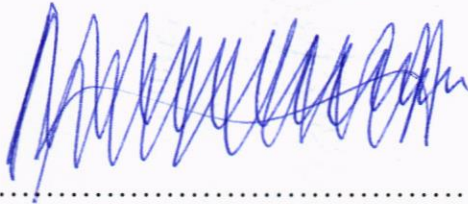
Hon. Justice H.S.B. Potani SC., JA



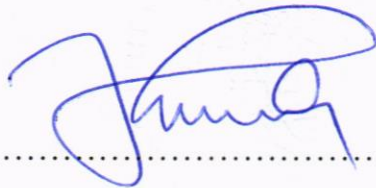
Hon. Justice J. Katsala SC., JA



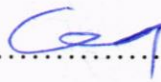
Hon. Justice I.C. Kamanga SC., JA



Hon. Justice M.C.C. Mkandawire SC., JA



Hon. Justice S. Kalembera SC., JA



Hon. Justice R.S. Mbvundula SC., JA



Hon. Justice D. Kamanga SC., JA