



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
HOMICIDE CASE NO. 263 OF 2016 (BAIL APPLICATION)**

BETWEEN:

CHARLES KUMBUYO.....1st APPLICANT

LOGINA MLEMGA.....2nd APPLICANT

AND

THE REPUBLIC.....RESPONDENT

Coram: Hon. Justice M L Kamwambe

Mr Salamba of counsel for the State

Mr Maele of counsel for the Applicant

Mr AmosOfficial Interpreter

BAIL ORDER

Kamwambe J

The two murder suspects applied for bail. The two were in a love relationship. They are alleged to have caused the death of an unknown person who was found dead at the premises or house of the 2nd Applicant who seemingly carried on business of prostitution. No independent person witnessed the murder. It is alleged that as the 2nd Applicant was trying to run away to Mozambique in fear of the consequences of the murder, she told the secret to some people and later upon arrest, the police, that the 1st Applicant found the deceased red handed in a sexual act with her (2nd

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Applicant) at night and a fight ensued and she joined the fight against the deceased. The deceased sustained a stab wound on the neck from which he bled profusely. It does not come out clearly who stabbed the deceased. This took place sometime in September, 2016.

According to the case of **Fadweck Mhave v Republic** MSCA Criminal Appeal No. 25 of 2005 the Supreme Court of Appeal interpreted section 42 (2) (e) of the Constitution to mean that all offences are bail able even the so called heinous offences such as murder and treason, unless the interest of justice requires otherwise. This places the burden on the State to prove the interest of justice justifying further incarceration. The Bail Guidelines Act 2007 were enacted to lead us into factors to consider when granting or denying bail. One important consideration is that the applicant/offender shall attend bail. If there are strong indications that he or she may not attend court at the set day, the court is entitled to use its discretionary powers of denying one bail.

The State is objecting to granting bail to the two Applicants on the basis of confession statement made by the 2nd Applicant as stated above. The State says that the 2nd Applicant is a flight risk since she attempted to flee when people asked her what she was doing. The State is of the view that there is strong evidence against the Applicants. Further it states that investigations are over and only the case docket remains to be sent to the State Advocate Chambers by the police.

According to section 176 (2) of the Criminal Procedure and Evidence Code, where there are more than one accused persons jointly charged of an offence, a confession by one of them if it implicates the co-accused person/s is only evidence against himself/herself, unless the implicated co-accused person/s adopt the said confession as his, hers or their own. This means that there is no evidence implicating the 1st Applicant if the evidence of 2nd

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accused implicating him is excluded as inadmissible. (See **Noel Numeri v Republic** Miscellaneous Criminal Application No.163 of 2009 **and Towera Chisa and Kelvin Chisa v The Republic** Miscellaneous Application No. 160 of 2009). The State says it is likely to use the 2nd Applicant as a State witness against the 1st Applicant. The State is perfectly entitled to do so, so that her evidence becomes admissible. The State should make its mind as to what it is going to do since investigations are now through. We cannot rely on what they may do but what they are going to do. It does not come out clear why the 2nd Applicant joined in to assault the deceased a person she just had casual sex with. The veracity of this statement of self-implication is very suspect. The crux of the matter is that there is at the moment no independent evidence implicating the 1st accused and that there is a danger of the so called confession statement of the 2nd Applicant being retracted. The Court shall also consider the degree of participation in the murder by stabbing by the 2nd Applicant.

Courts exercise discretionary powers to grant or withhold bail, but this discretion shall be used judicially or in a legally reasoned manner. As facts stand now I do not think that there is a strong case against the Applicants as required by the Bail Guidelines Act, and there is no evidence that the Applicants would tamper with evidence, witnesses or the course of justice. The 2nd Applicant may have intended to flee but her conscience dictated her to expose what transpired on the fateful night to some community members. She chose to free her mind. I am inclined to grant them bail but under strenuous conditions as follows:

1. To surrender all travel documents to Phalombe police station.
2. Each to be bonded in the sum of MK50, 000.00 which shall be forfeited if they fail to attend court on the set day.
3. Each shall furnish two sureties who are close relations with known abode in Malawi who shall be bonded in the sum

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Of MK400, 000.00 but not cash payable upon the Applicants jumping bail.

4. The Applicants should not leave Phalombe district without informing the police.
5. To be reporting at Phalombe Police station immediately after release and every Fridays on a weekly basis, and after three months fortnightly.
6. To appear before this court at Phalombe Magistrate court for plea on the 30th November, 2016 at 9:00 am.

This is my Order.

Made in Chambers this 15th day of November, 2016 at Chichiri, Blantyre



M L Kamwambe
JUDGE

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