IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

MISC. CRIMINAL CASE NO 44 OF 2016

BETWEEN:

WISIKOTI MWALIMU……..……1ST APPLICANT
KADZAMIRA MTILONGO MWALIMU…….2ND APPLICANT
GIFT MALIKO…….3RD APPLICANT

-AND-

THE REPUBLIC.……...……RESPONDENT

Coram:Honourable Justice Dr. C.J. Kachale, *Judge*
Sikwese, of Counsel for the Applicants
Respondent not represented
Choso (Mrs.),Court Clerk

RULING

Introduction

Wisikoti Mwalimu and his two friends first applied for bail in this court on 21st April 2016. The application was supported by the affidavit of *Counsel Sikwese*; the state filed an affidavit in response sworn by *Senior State Advocate Gondwe*. At the hearing of the summons on 29th June 2016 my sister *Justice Ivy Kamanga* gave directions to the effect that the substantive application would not be heard until the preliminary question whether counsel for the applicants was competent to swear the supporting affidavit (instead of his clients themselves) had been resolved; the parties were required to present written legal submissions on the issue.

On 12th October 2016, in the interests of time, my court heard both the preliminary arguments as well as the substantive bail application; regrettably the state made no appearance on this occasion, neither did it file any arguments in respect of the preliminary question raised my learned sister.

Determination of preliminary issue: admissibility of affidavits of counsel

Counsel Sikwese has filed written arguments on the point; in summary he has contended that the law is well settled on the matter: affidavit evidence in bail applications is treated in a similar manner to such affidavits in interlocutory applications within civil proceedings.

The dictum of *Villiera, JA* in **Tembo and others-v-DPP**, (MSCA Crim. Appeal No. 11 of 2004) [1995] MWSC 1 (11 Sept. 1995) in these terms has been quoted:

> "…The same is true of affidavit evidence. It should readily be receivable in bail applications so long as its purpose is not to prove the guilt of the accused but merely to assist the court decide the bail issue. **I can see no [difference] between affidavit evidence in a bail application and that in preliminary matters in civil proceedings**. It must be noted also that affidavit evidence is not in any way inferior to other types of evidence. It is a well-known fact that these Courts have made important decisions relying on affidavit evidence." (Emphasis supplied)

In that regard it has been pointed out that in civil proceedings Order 41 rule 5 (1) of the Rules of the Supreme Court allows counsel to swear affidavits in such preliminary or interlocutory applications, see for example **Fred King Nkhwazi-v-Liquidator of Finance Bank** [2009] MLR 159.

It is fair to assert that such affidavit evidence has been invoked in our courts as a matter of course. Thus in the case of **Joyce Alice Gwazantini-v-The State,** Misc. Crim. Application No. 169 of 2001 (unreported) Kapanda, J (as he then was) noted that '*…the application has been supported by four affidavits viz* ***two sworn by learned counsel for the Applicant****, one has been sworn by the husband of the Applicant and another affidavit has been sworn by the Applicant herself…the State, through Counsel, has sworn an affidavit in opposition to the applicant's prayer [to be] released from custody on bail…*' (Emphasis supplied)

Furthermore in considering the application for bail in **Lunguzi and others-v-Rep** [1995] 1 MLR 128, at 130*Chimasula Phiri, J*(as he then was) noted that '*…the application is supported by an affidavit of Mr Gustav Kaliwo [counsel for the Applicants]. Statements of [the Applicants] are exhibited thereto and clearly*

marked [in compliance] with Order 41 rule 11 of the Rules of the Supreme Court. As such this court is entitled to consider the contents of these exhibits…' In other words bail was considered and granted on the strength of counsel's affidavit; more interestingly, the court invoked civil procedure rules to determine the admissibility of certain critical documentary in a criminal law application.

Indeed in the case of **Chilumpha and others-v-Rep** [2006] MLR 363 my learned brother *Justice Mkandawire* emphasized that according to section 2 Part II of the Bail (Guidelines) Act,2000 (cap 8:05) the court is enjoined to deal with bail applications expeditiously and may postpone the same to permit the accused or the state to adduce evidence or further information.*Justice Mkandawire* emphasized the pre-eminence of the Bail Guidelines Act (2000) as a statute over any case law; at pages 374 and 375 of the report he observed thus

> "…In the *Mvahe* case, the court went ahead to give guidance to the lower courts as to what factors the court should take into account before it decides to grant bail to the accused. My observation here is that although it was not explicitly mentioned therein, the Malawi Supreme Court of Appeal was actually reproducing what is contained in the Bail (Guidelines) Act, 2000. Moreover by the time they came up with their decision on 16th November 2005 this Act had been in existence for five years. This court therefore is compelled to refer to these bail guidelines since they have the force of law and take precedence over case law…"

Therefore, in the considered opinion of this court, there is no legal bar to counsel swearing an affidavit in a bail application on behalf of his client; this would accord with the views expressed by *Villiera, JA* in the **Tembo Case** (above) in so far as t mirrors the applicable practice in civil proceedings with regard to preliminary applications.

Furthermore such a practice becomes more pertinent in the context of section 2 Part II of the Bail (Guidelines) Act, 2000 which requires the courts to deal with bail applications without delay. This statute must govern the judicial approach to these proceedings as righty proposed in the **Chilumpha case** (above); even so the provision contemplates that the particular court hearing the bail application may require further information or evidence which could necessitate the reception of evidence from the applicant himself or even the state.

Besides, section 3 of Part II of Cap. 8:05 provides that '*If reliable or sufficient information is not before the court, the court may order its production.*'Thus where the court has reason to doubt or question the reliability of the initial evidence put forward in the affidavit of counsel, it could invoke its powers under this law to seek further clarification; this is what happened in the case of **Gift Chanza and another-v-The State**, Misc. Crim. Application No. 34 of 2015 (unreported).

Upon establishing that assertions of counsel in his affidavit in support of the bail application were false, the court proceeded to initiate disciplinary proceedings under section 21 (1) of the Legal Education and Legal Practitioners Act (cap. 3:04) by which counsel was required to show cause why any sanctions should not be impose for supplying false information on oath. In other words, the law provides remedies against the defaulting counsel in the event of inaccurate or outright false information or evidence being furnished in these types of proceedings.The need for the court to enforce discipline amongst legal practitioners was well explained by Banda, CJ in **Attorney General-v-Chiume** [1994] MLR 20at 24 thus:

> "A practicing lawyer is an officer of the court and it therefore becomes the duty of the court to ensure that the conduct of its officers is beyond reproach and to punish those whose conduct is unworthy of their position as officers of the court…"

Thus in **Wyson John-v-Rep**, Bail Cause No. 86 of 2015 (PR) (unreported) my brother *Justice Michael Tembo* admonished counsel for the applicant who swore a false affidavit to the effect that his client had been incarcerated since 2008 without trial (yet the court established that the applicant was in fact a convicted offender properly incarcerated on the basis of his custodial sentence); the lawyer's attempt to try and withdraw the application once the court noted the anomaly was resisted.

Since the decision of *Justice Tembo* captures well the scenario which prompted the initial judge to request written arguments on the admissibility of affidavits of counsel I will extensively reproducehis dictum with full affirmation:

> Perhaps this is an opportune time to raise a concern about affidavits that are sworn and filed by counsel on behalf of applicants in criminal applications such as the instant one. Of course, in many cases, where it is said that counsel got information from an incarcerated applicant who could not swear an affidavit, that counsel is properly swearing such an affidavit in good faith. However, it is also possible for such affidavits to be used as a way to get some undeserving convicts and others out of lawful custody illegally. It is

therefore important that this issue be given due attention because otherwise the criminal justice system that is already under growing criticism for being skewed against the poor may lose the credibility that it has now. The view of this Court is that when counsel swears such an affidavit, basing on information from a detained person, counsel must carefully consider and even state the basis on which he believes his client instead of just saying that he believes what his client is alleging as was the case in this matter. So, for instance, in the present matter, counsel should ideally have stated that he believed his client after having also verified with the Prison authority as to the authority under which his client was being held. This Court is stating this because there is a big incentive to lie to get to freedom.

By way of an analogy drawn from civil matters, for an affidavit based on information given by a third party which states that the deponent believes such third-party information to be true, the deponent thereof must carefully consider grounds for believing such information to be true. Such affidavits are not to be used without care. See Note 41/5/4 to Order 41 rule 5 Rules of the Supreme Court 1965 which is to the following effect

> Although in practice the grounds of the witness's information or belief are frequently not stated, a deponent should never state that he believes something unless he has applied his mind to the matter and concluded that there are good grounds for his belief: the widely-used formula "I am informed by A and believe that ... " should not be used without care. Further, a party against whom an affidavit of information or belief which omits the relevant grounds is made is entitled to take the objection and if the objection is one of substance, the Court is bound to pay regard to it and the CA has commented strongly on the irregularity of an affidavit founded upon information and belief merely, without giving the source of such information and belief (Re J. L. Young Manufacturing Co. [1900] 2 Ch. 753, CA; and see Lumley v. Osborne [1901] 1 K.B. 532).

Why is it that in criminal matters such as this one counsel just states in the affidavit that he believes his client, the applicant, without properly considering the grounds for such belief or without proper care being taken in making such a statement? This is not a light matter. It is a matter that goes to the root of the integrity of our criminal justice system. It is a matter to be taken seriously by both the bench and the bar.

There is a related issue in that the Criminal Procedure and Evidence Code in section 184 prohibits hearsay evidence in the course of oral evidence in criminal proceedings. However, although the said Code in section 118 (3) provides that the High Court may consider the granting of bail on an application, it makes no provision as to how such applications are to be made whether supported by affidavit or not and as to what facts can be deponed in such affidavit either based on information and belief or not. In *Yiannakis v Rep* [1994] MLR 388, Mwaungulu J. , as he then was, in considering affidavit evidence

on an application for bail under section 118 (3) of the Criminal Procedure and Evidence Code stated that courts are slow to decide on affidavit evidence as follows

> Mr. Osman contended very strongly that the evidence appearing in his affidavit clearly showed a possible defence to the charge the possible defence being preservation of life and property and extreme provocation. No doubt this is a strong point. The only problem with it is that it is on affidavit and, as I have said before, courts have been slow to exercise the discretion on affidavit evidence. In the Stewart case the court was able to exercise its jurisdiction because the defence came out of the report of the committing justice.

It must however be noted that in the High Court of England and Wales bail applications are considered on application supported by affidavit pursuant to Order 79 rule 9 Rules of Supreme Court 1965. An examination of Order 41 rule 5 Rules of Supreme Court on affidavits does not explicitly exempt affidavits under Order 79 from the prohibition of hearsay statements or statements of information and belief. But the said Order 79 is inapplicable to Malawi as per the proviso to section 29 Courts Act by virtue of being based on an English statute, the Criminal Justice Act 1967, passed later than 11th August 1902. It however remains that the use of affidavits of information and belief by applicants for bail under section 118 (3) of the Criminal Procedure and Evidence Code is a matter that requires proper and further consideration. Proper rules on the same are required to avoid situations such as the one that arose herein where counsel swore an affidavit believing his client to be telling the truth when a small step of verification with the custodial authority would have brought the true material facts to light.

In this court's opinion, therefore, given the current state of the law and practice it might be rather disproportionate to disallow such affidavits entirely. As my learned brother has observed in the lengthy quote above, this area of the law may be ripe for reform which should (among others) address some of the concerns arising from the unprofessional or unethical conduct of our own legal practitioners in presenting affidavits that are untruthful.

In the meantime it might be useful to note that according to section 4 (b) (viii) Part II of Cap. 8:05 the presentation of false information may suggest likelihood that if granted bail the applicant may seek to interfere with witnesses or conceal or destroy evidence. Thus such false evidence may be a basis for declining the application for bail; if bail was already granted on such wrong information it could even be revoked. Otherwise, it might (in the absence of express authority articulated in rules of procedure) be irregular to exclude all such affidavits as a matter of course.

Ruling on the substantive prayer for bail

Now, reverting to the substantive application for bail, the court observes that the applicants have been in custody since January 2016. The state did not even oppose their prayer for bail; unless the court was to find other overriding interests of justice in terms of section 9 Part II of the Bail (Guidelines) Act the present application must be upheld, which it is.

Accordingly ***Wisikoti Mwalimu, Kadzamira Ntilongo Mwalimu*** and ***Gift Maliko*** are all granted bail on the following conditions severally:

1. Each one should execute a bond of MK20, 000 not cash;

2. Each one should produce two(2) reliable sureties to be bound in the sum of MK15, 000 not cash each;

3. Each suspect must report at Dedza Police Station every Friday until the conclusion of their case;

4. Each must not travel outside Dedza without the consent of the Officer-in-Charge at Dedza Police Station.

Any proposed bail sureties will be examined before the Registrar of this court.
Order accordingly.

Made in chambers this 26th day of October 2016 at Lilongwe.

***C.J.Kachale*, PhD**
JUDGE