IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC. CRIMINAL APPLICATION NO. 83 OF 2002

BETWEEN:

FATINESI CHEKAYA.....APPLICANT

-and-

THE REPUBLIC.....RESPONDENT

CORAM: HON. JUSTICE A.C. CHIPETA

Mulemba; of Counsel for the Applicant

Kamwambe, Chief State Advocate,

of Counsel for the Respondent

Kamanga; Official Indterpreter

RULING

Fatinesi Chekaya is the applicant in this matter. I heard her motion for bail yesterday. From the affidavit in support it appears she was arrested on 1st November, 2001 in respect of the deaths of three children. The State has given an indication that it intends to prosecute her for Manslaughter.

Very moving and eloquent arguments and submissions were made by Mr Mulemba, of Counsel, on behalf of the applicant in this case. In brief they were to the effect that subject to the interests of justice requiring otherwise S. 42(2)(e) of the Constitution grants every accused person, including the applicant herein, the right to be released on bail. The primary consideration when the question whether or not to grant bail to any applicant arises being whether or not it is likely that such person would be available to attend his or her trial, it was submitted that the State not having attempted to show the strength of their case, and not having shown that the applicant might interfere with their witnesses or their evidence, and that further not having shown that the applicant has the means to travel out of Malawi, the interests of justice require that she be granted bail. On point that the State intends to charge the applicant with Manslaughter it was argued that believably in such case no exceptional circumstances need be proved.

The State filed an affidavit in opposition to this application and at the hearing proceeded to so object to bail. Mr Kamwambe, the Chief State Advocate, argued that for ordinary

cases the arguments advanced by the applicant carried weight, but that for this heinous offence different principles apply. Referring to the cases of Brave Nyirenda, Zgambo, Gwazantini, and Tembo without detailing out their citations Mr Kamwambe pointed out that there is an abundance of case authority to the effect that for these types of offences courts ought to be slow to grant bail and that the requirement is that courts only grant bail in such cases on show of exceptional circumstances and this he said the applicant has not done. The State indicated it was ready to commit the applicant for trial any day from yesterday and prayed that the application herein should not be granted.

I should first observe that with the Bail (Guidelines)Act, which Mr Mulemba ably made reference to, now in place and with the wealth of case authorities in place, the exercise of granting or withholding bail in criminal cases has been made relatively easy for courts. I must say that for my part I have always treated Manslaughter as a rather high ranking offence in the category of serious offences. Much as indeed it is a lower scale offence when compared with Murder I think compared with Robbery where at the end of the crime there is still life going on, Manslaughter, which relates to termination of life, should, in my view, rank higher. Of course there are different types of Manslaughter, but all the same from the punishment the legislature has attached to this offence i.e. life imprisonment, I do not think it can rightly be downgraded to the level of common crime. In the absence of any authority classifying Manslaughter below the group of serious or heinous offences, I think I must continue to treat it as belonging to that category.

Now if I am correct in so viewing this offence then I am bound by the authorities that are abound from the Supreme Court on the subject. These authorities in no uncertain terms project the position that for this class of offences it is incumbent on he or she who seeks bail to show that there are exceptional circumstances qualifying him or her for bail. An indicator of this position of the Supreme Court is well illustrated in the statement:-

“In our view it must be rare when the interests of justice can require that a capital offender or persons accused of serious offences should be released on bail.”

at p 6 of McWilliam Lunguzi -vs- Rep M.S.C.A. Criminal Appeal No. 1 of 1995 (unreported). I can therefore only grant bail in this case if I am satisfied that the applicant has shown me the requisite exceptional circumstances qualifying her for bail.

To be quite frank I think the applicant has not shown any such exceptional circumstances in this case. True the State has not indicated what evidence it has in the case and indeed they have not made any comment regarding the likelihood or otherwise of the applicant interfering with their evidence or their witnesses. True also they have not indicated whether the applicant possesses any travel documents that might enable her to leave the jurisdiction. Be this as it may, from what I know of the stand of case law on exceptional circumstances, I do not find myself convinced that this mere pointing out by the applicant of what she argues are shortfalls in the State’s response to her application for bail as per the guidelines amounts to exceptional circumstances. The applicant having fallen short of what she is expected to demonstrate to obtain bail in a serious offence I cannot grant bail on basis of sheer sympathy with her. I must therefore refuse bail. Accordingly I dismiss

her application.

Made in Chambers this 24th day of May, 2002 at Blantyre.

A.C.Chipeta

JUDGE