IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLENEOUS CRIMINAL APPLICATION NO. 159 OF 2008

BETWEEN:

WILLY SAMBO ……………………………………… 1ST APPELLANT

-and-

EDWARD ANAFI …………………………………… 2ND APPELLANT

-AND-

THE REPUBLIC ……………………………………… RESPONDENT

CORAM: Hon. Justice M.L. Kamwambe
Messrs Katuya & Zambezi of Counsel for the State
Messrs Chiphwanya & Mmeta of Counsel for the Appellants
Mrs Mangisoni, Official Interpreter

Kamwambe J

RULING

This is the Appellant's appeal against the Chief Resident Magistrate refusing to grant them bail on the ground that if released on bail, they are likely to commit further similar offences.

In the lower Court the Appellants are 4th and 5th accused. They are charged with the offence of theft of 6 tons of Malawi Telecommunication Ltd (MTL) cables which were found in a truck hired by 4th accused allegedly, enroute to

South Africa. The Appellants were arrested separately from the others by a warrant of arrest procured through the Chief Resident Magistrate in Blantyre after the State had complained that the police was not arresting them. They were charged by the Chief Resident Magistrate who later denied them bail while the others were charged earlier before the second grade magistrate Court in Mwanza. I take it therefore that this appeal is only in respect of these two.

Before attending to this appeal I dealt with the issue of transferring of the case from Mwanza Magistrate Court to Blantyre Magistrate Court. The 1st and 3rd accused who were in attendance in my Chambers intimated that they were happy with the proposal, and seeing that all the five accused persons are based in Blantyre so too their counsel, I ordered the transfer because it is logical in that it makes economic sense to transfer the case to Blantyre Magistrate Court, but not necessarily to be tried by the Chief Resident Magistrate.

I received well researched skeletal arguments from counsel in respect of the issue of bail. I note that the issue of presumption of innocence while a person is yet to be found guilty came out prominently. I should in the outset state that the presumption of innocence is not inimical with denying one bail. The two do not conflict. Another point is that when one is denied bail it is not assumed that he is guilty. It is only in the interest of justice that bail is denied. Ordinarily then Courts have to weigh the interest of justice against the Defendant's right to liberty in the context of the presumption of innocence.

So, whereas you are presumed innocent since you are not convicted yet, certain factors may militate against you continuing to enjoy your liberty – you become at risk of losing your liberty. It is those factors that I would wish to analyse in this appeal.

The state has submitted that the two Appellants are already answering a charge each of a similar nature, to wit, theft of MTL cables. Such being the case, they are likely to commit other or similar offences. They state that they had committed the current offence whilst on bail and if granted bail they are likely to do the same.

The Appellants have argued that having committed the offence once is not enough to raise the likelihood of committing the offence again whilst on bail. They went on to say that in any case the offences they are alleged to have committed are not through and have not resulted in any conviction. It has been specifically stated that 1st Appellant was merely mentioned in a case of theft involving his nephew in May 2008. He was granted police bail and that the 2nd Appellant is answering a similar charge in another case in which trial is not concluded yet and is currently on court bail. It is thus not in dispute that there are pending cases in the lower courts pertaining similar offences to current charge.

Arguments have boiled down to interpreting the phrase "likelihood to commit offences." The Appellants are of the view that the phrase should be interpreted to mean "more than just a mere possibility or probability." In another breath they say it should be interpreted to mean a "tendency or real possibility." In their view, the State has failed to and did not show evidence of a real threat of a tendency or real possibility of commission of offences if bail were granted to the Appellants.

In **Livingstone Thomas Associated Newspapers Ltd** (1969)90 WN (Ptl) (NSW)223 Wallace P in his judgment said:-

> *"The word 'likely' can scarcely mean 'more likely than not' in s5… I hold that* the *word likely in the phrase 'likely to interfere with witnesses'in s9 (1) (f) means likely in the sense of a tendency or real possibility. It does not mean more likely than not; 'probably' or very likely."*

Further it was concluded in the case as follows:-

> *"Having regard to all the evidence placed before me and, in particular, the evidence that interference has already occurred, there is a real possibility in the instant case that witnesses will be interfered with if the applicant is released on bail. For these reasons, I am satisfied to the requisite extent as envisaged in s 9 that the applicant is likely to interfere with witnesses. Accordingly the application for bail is refused."*

Our own Bail (Guidelines) Act No. 8 of 2000 s5(b) talks of 'the likelihood' of the accused committing an offence while on bail. The ordinary meaning should be given to the word 'likelihood'. I would like to agree with Wallace P when he likens it to tendency or 'real possibility'. I should also mention that the standard of proof to be used in bail hearings is not expected to be as rigorous as in criminal proceedings. It is not that high a standard that is why it is based on affidavit evidence. It is therefore true that the purpose of bail proceedings is not to prove ones guilt but to fulfil the requirements of the Bail (Guidelines).

I take note of the wise observation in **R v Phillips** [1947] 32 Cr.App. R 47 at 48 where the Court said:-

> *"Some crimes are not likely to be repeated pending trial and those cases there may be no objection to bail; but some are, and house breaking particularly is a crime which will very probably be repeated if a prisoner is released on bail."*

I hold the opinion that theft is also an offence likely to be repeated. If you are a charged suspect in a case and on being granted bail you commit a similar offence, you are likely to repeat the commission of the offence once released on further bail. I do not see any logic that we should wait for more than one charge against the applicant especially when the theft of Malawi Telecommunications Ltd cables is rampant and is committed with great amount of safety to

the person committing it. It has been established to my contentment that there is likelihood of the Appellants committing an offence whilst on bail. (My emphasis as stated in Bail (Guidelines)

In conclusion, having read and appreciated the arguments of both parties, I decline to grant bail to the Applicants and thus the application is dismissed.

Made in Chambers this 11th day of August, 2008 at Chichiri, Blantyre.

M.L. Kamwambe
JUDGE