



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CRIMINAL APPLICATION 202 OF 2008
IN THE MATTER OF AN APPLICATION FOR BAIL UNDER
SECTION 42 OF THE CONSTITUTION**

- AND -

**UNDER SECTION 118 OF THE CRIMINAL PROCEDURE AND
EVIDENCE CODE, CAP 8:01**

BETWEEN:

MUMTAZ MALUK LAMBATPLAINTIFF

- AND -

THE REPUBLICDEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Mr Kasambara, of Counsel

Mr Mulemba, of Counsel } for the applicant

Miss T Longwe, Senior State Advocate, for the State

Mrs Moyo – Official Interpreter

ORDER

Manyungwa, J

INTRODUCTION:

This is an application for bail made by Mr Kasambara jointly with Mr Mulemba, of counsel on behalf of the applicant, one Mumtaz Maluk Lambat. The state was represented at the hearing by Miss Longwe, Senior

State Advocate. The application is made under Section 42(2)(e) of the Constitution as read with Section 118 of the Criminal Procedure and Evidence Code, Chapter 8:01 of the Laws of Malawi. There is an affidavit in support of the application sworn by Mulemba, of counsel on behalf of Mumtaz Maluk Lambat, to whom I shall hereinafter refer to as the applicant. There is also filed together with the applicant's affidavit skeleton arguments, and a supplementary affidavit sworn by Professor Jack Wirima, all of which were adopted by Counsel for the applicant. The State through Miss Longwe swore an affidavit in opposition, and also filed skeleton arguments, both of which were also adopted by the State.

THE APPLICANT'S CASE:

In his affidavit in support, Mr Mulemba states that the applicant is a Malawian, aged 38 years and resides in the City of Blantyre. She is a widow of one Abdul Lambat, who died on 3rd November, 2006 at Mwaiwathu Private Hospital. It is deposed that the applicant was arrested by Limbe Police on 16th September, 2008 on suspicion that she played a role in her husband's death. The circumstances leading to the applicant's arrest were as follows: - The applicant had been married to the deceased for 11 years prior to his death, and they had a son called Nadeen. It is stated that in 1988 the deceased suffered from Osteosarcoma, a type of cancer for which he was treated by way of chemotherapy. The deceased later developed cardiomegaly which led to progressive heart failure. He became very sickly and his breathing problems and the heart failure became more severe, complicated by the recurrence of the cancer. The deceased was for a long time prior to his death in and out of the hospital but his health never improved as is evident from exhibits "YM1" and "YM2", which are the copies of the deceased medical records. It is further stated that on the day of the incident the deceased went to work at his garage as usual and then later went home for lunch at noon where he ate the same food together with his son from the same plate. Then the deceased came at about 16:30hours, short of breath. The deceased refused to go to the hospital, whereupon the applicant called the deceased's relatives who upon arrival accused the applicant of having poisoned the deceased. The deceased's condition further worsened and he was subsequently taken to Mwaiwathu Hospital where he died at about 23:30 hours.

It is further deposed by Mr Mulemba, that until the time of his death, there had been no hostility between the applicant and her in – laws on one hand and between the applicant and her husband, the deceased on the other hand. It is stated that the deceased was on heavy medication immediately prior to his death, taking about 20 tablets per day, the deceased expressed his wish to end his life because he thought it was too much to bear, and that when the applicant relayed this information to the deceased’s parents they counselled him against it. It is further deposed that since January, 2007 the applicant had been invited to make statements to the police on a number of times. The police at first required the applicant to report to them every fortnight, which the applicant complied with until 3 months ago, when the applicant was instructed not to.

It is therefore contended on behalf of the applicant that based on the foregoing it is likely that the applicant will be available to take her trial she is released on bail. Further, it was also deposed that the applicant is asthmatic and has a kidney condition that requires constant medical attention as is evident from exhibit “YM22”. Mr Kasambara therefore submitted that the interests of justice would therefore in the circumstances be served if the applicant was released on bail and be allowed to attend trial from her home.

Further, there is an affidavit in support sworn by Professor Jack Jeremiah Wirima, MB, CHB (Manc), MRCP (UK) DTM & H (L’Pool), FRCP(Edin) FRCP1, FRCP (London), a professor of Medicine and who runs a private practice at Mwaiwathu Private Hospital. In his affidavit, Professor Wirima has deposed that he is the doctor who attended to Mr Abdul Lambat of Chambwinja Village, T/A Machinjiri in Blantyre and that the said Abdul Lambat died at Mwaiwathu Private Hospital on 3rd day of November 2006 and that he is the doctor who prepared the Death Report as is evident from exhibit “JJW1” a copy of the said report dated 23rd November 2006.

THE RESPONDENT’S CASE:

As I pointed out at the outset, the State opposes the application, and in her affidavit, Miss Longwe Senior State Advocate deposes that the applicant was arrested on 16th September, 2008 on suspicion that he caused the death of the deceased, who was her husband. The deceased, it is stated, passed away on 3rd November, 2006. It is further deposed that initial investigations

into this matter were conducted and finalised and that although the applicant was a prime suspect, she was never arrested for unknown reasons. However, fresh inquiries into the death of the deceased have led to the arrest of the applicant, and that the applicant has already been charged with the murder of the deceased and that the applicant had already been committed to the High Court on 18th September, 2008. It is conceded in Miss Longwe's affidavit that during his life-time the deceased suffered from several fatal medical conditions, however a post – mortem examination conducted on the deceased indicated that death was due to respiratory failure due to poisoning with a pest – cide which contained fatally poisonous substances known as propoxyphene and Norpropoxyphene. It is therefore contended that the deceased' critical condition leading to his death came about only after the deceased had eaten food prepared by the applicant. The State also contends that the applicant has been charged with a very serious offence attracting a maximum sentence of death or life imprisonment and that the evidence against the applicant is strong. Further, the State contends that ill – health of the applicant is not a ground *per se* for granting bail as the same is only considered where it is shown that the applicant's ailing health is a direct result of the confinement and where the applicant is in real danger of his or her life. It is further contended that since the applicant's medical condition is on – going it only requires proper management, and that in this regard prison authorities have the mandate to refer the applicant to the hospital in case of any eventualities as is usually the case with other prisoners. It was therefore submitted on behalf of the State that it is only in the interests of justice that the applicant be further detained in custody in order to secure her attendance at her trial. The State further submitted that in the alternative, that in the event the court decides to release the applicant on bail then such release should be with thought or strict conditions.

SUBMISSION:

Both Counsel for the applicant namely, Mr Kasambara and Mr Muyamba, on the one hand, and Miss Longwe, for the State on the other hand, put up spirited and eloquent submissions in court during the hearing and I am greatly indebted for their research and industry. However, I am unable to recite all their submissions due to reasons of brevity.

ISSUES FOR DETERMINATION:

The main issue for the determination of this court is whether or not the court should grant the applicant bail as prayed for by her legal team, or whether bail should be denied as submitted by the State.

THE LAW:

The relevant law governing the issue of bail in the instant case is Section 42(2)(e) of the Republican Constitution which is in the following terms: -

S42(2) “Every person arrested for, or accused of, the alleged commission of an offence shall in addition to the rights which he or she has as a detained person have the right to:

...
(e) to be released with or without bail unless to the interests of justice require otherwise”.

Further, it must also be pointed out that the right to bail has also been recognised in Section 118 of the Criminal Procedure and Evidence Code.¹ The relevant parts of that section provides as follows: -

S118(1) “When any person, other than a person accused of an offence punishable with death, is arrested or detained without warrant by a police officer, or appears or is brought before a court and is prepared at any time while in custody of such police officer or at any stage of the proceedings before such court to give bail, such person may be released on bail by such police officer or such court, as the case may be, on bond with or without sureties.

(3)The High court may either of its own motion or upon application direct that any person be released on bail or that the amount of any condition attached to, or any bail required by a subordinate court or police officer be reduced or varied”.

Additionally, Section 1, Part II of the Bail Guidelines Act² provides: -

S1 “A person arrested for, or accused of the alleged commission of an offence is entitled to be released with or without bail, at any stage preceding his or her conviction in respect of the offence, unless the

¹ The Criminal Procedure and Evidence Code, Chapter 8:01 of the Laws of Malawi

² Bail Guidelines Act, 2000

court finds that it is in the interest of justice that he or she should be detained in custody”.

Clearly therefore, the law is clear both under Section 42(2)(e) of the Constitution and Section 118 of the Criminal Procedure and Evidence Code, and that is to effect that the High court has power to grant bail to any detained person who is alleged to have committed any offence. As was clearly stated by the Supreme Court of Appeal in the case of *Fadweck Mvahe V Rep*¹ that: -

The first principle is that the High court has power to release on bail a person accused of any offence including murder. . .”

This power has long been recognised. In *McWilliam Lunguzi V The Republic*² then Chief Justice Richard Banda in 1995 had this to say on the point.

“There has recently been a spate of bail applications and we consider it appropriate that we should give some guidance on the principles which courts should always bear in mind when applications for bail are brought before them. First, we would like to make clear beyond reasonable doubt that the High Court has power to release on bail a person accused of any offence”.

The position at law is therefore that an applicant for bail is entitled to be released as a matter of right unless the interests of justice require otherwise.

The paramount consideration when a court is determining whether to grant bail or not to an applicant, is whether it is likely or not that an applicant if granted bail would appear for his or her trial. I have always found the words of Chief Justice Farris, SC in the Canadian Case of *Rex V Hawken*³ very instructive. This is what the learned Chief Justice said: -

“The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be

¹ *Fadweck Mvahe V Republic* MSCA Criminal App. No. 25 of 2005

² *McWilliam Lunguzi V Republic 1995* 1 MLR 632

³ *Rex V Hawken* (1944) 2DLR 116, 119 - 120

granted when the judge is satisfied that the bail will ensure the accused appearing for his trial”.

Furthermore, in *Rex V Monrovin*¹ Lord Justice Mann said thus, in answering the question as to what is meant by the expression, “interest of justice”

“Interest of justice require that there be no doubt that the accused person shall be present to take his trial upon the charge in respect of which he has been committed”.

Further in the *Fadweck Mvahe V Rep*, the Supreme Court has clearly stated the law that it is upon the state, where bail is being objected to, to show why it would not be in the interest of justice to admit an accused to bail.

In the instant case, the state submitted that that it was objecting to the bail application because the case against the applicant is strong. Further, the state submitted that results of a post – mortem examination conducted on the deceased, showed that the deceased died from poisoning and that the applicant is heavily implicated. Let me begin by pointing out that it is not the strength of the case that would make the court decide whether to grant bail or not but rather whether it is likely that if granted bail an applicant will appear for his trial. The strength of the case is just one of the factors taken into account. Moreover the said Post – mortem report was not exhibited and it is stated in the affidavit sworn in support that since 2006, when the deceased died, the applicant has on several occasion been required to report at the police station and there is no evidence to show that she has failed to comply. Rather on the contrary the applicant’s behaviour, which has not been disputed by the State is one that demonstrates that the applicant co – operated with the police throughout their investigations even when she was not charged with any offence. Thus it can hardly be argued by the State that the interests of justice therefore would require that bail be denied. Of course, I must state that I fully agree with the position taken by Counsel for the applicant as well as Counsel for the State, that illness of an applicant *per se* is not a ground for consideration by the court in granting bail unless the same is shown to have arisen consequent upon incarceration.

In these circumstances, and by reason of the foregoing I am inclined to exercise my discretion in favour of the applicant and I hereby grant bail to the applicant on the following terms and conditions: -

¹ *Rex V Monrovin* (1911) 3 Mann LR page 582

CONDITIONS

- 1) The applicant to surrender all her travel documents if any to the Registrar of the High Court
- 2) The applicant to produce two reliable sureties each of whom shall be bond in the sum of MK100, 000.00 not cash
- 3) The applicant to enter into a cash bond of MK40, 000.00
- 4) The applicant to be reporting to the Officer – In – Charge Limbe Police on Mondays and Fridays before 3pm on both days
- 5) The applicant to enter into a bond not to disturb the peace, or investigations
- 6) The applicant should not leave the jurisdiction except with the permission of the High Court upon being petitioned, by *inter alia* showing proof of intention to travel, purpose of travel, likely duration of stay and likely date of return.
- 7) The applicant not to leave Blantyre District without first informing the said Officer – In – Charge Limbe Police as to her intended destination and the likely duration of her stay.

The sureties are to be examined by the Registrar.

Pronounced in Chambers at Principal Registry, Blantyre this
September 2008.

22nd

Joseph S. Manyungwa
JUDGE

