

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
MISC. CRIMINAL APPLICATION NO. 1 OF 2004

SAMSON TATE ZIMBA..... APPLICANT

-AND-

THE REPUBLIC RESPONDENT

CORAM: HON CHINANGWA, J

Kachale, Counsel for the State
Tambulasi, Counsel for the Applicant
Chulu, Court Interpreter

RULING

The applicant Sam Tate Zimba through counsel Tambulasi brought this application. The purpose is to move this court to discharge applicant for want of prosecution on the criminal charges against him.

From the court record the applicant appears to be a member of the Malawi Defence Force, that is to say a soldier, based at Kamuzu Barracks, Lilongwe. He is alleged to have committed criminal offences in the course of discharging his duties. The

case was registered as criminal case no. 1 of 2004. On 5th May, 2004 he was granted bail on these conditions:

- (a) *he was to deposit K25,000 cash with the court*
- (b) *he was to produce two sureties bonded in the sum of K500,000.00*
- (c) *he was to report at Kawale police station every Monday.*
- (d) *He was to surrender all travel documents to police.*

He initially complied with the conditions reporting at Kawale police station every Monday. However, in August, 2004 applicant stopped reporting. He disappeared. Official information revealed that applicant, though he had surrendered his passport to the police, he fraudulently obtained another passport. By sheer luck, police arrested applicant on 13th June, 2006. On 30th June 2006 his bail was revoked by court which resulted to custodial remand.

After 10 months in custody applicant brought a habeas corpus application heard before Mrs Kamanga, J on 25th April, 2007.

The judge expressed displeasure on the state's failure to prosecute applicant. She ordered the state to commence prosecution within 21 days from date of her order and that trial be concluded within 3 months. Should the case not be concluded applicant be admitted to bail. The judge was reluctant to immediately grant bail to applicant because of his past record of jumping bail.

On 30th June, 2007 applicant was granted bail by Singini, J. on these conditions:

1. *The applicant to furnish two surities bonded on the sum of K5,000 each not cash. To be examined by the Registrar.*
2. *The applicant to report to the nearest police once every fortnight on Fridays.*
3. *Applicant not to leave the area of jurisdiction of the police without the permission of the officer-in-charge.*

The court record shows that the applicant is enjoying liberty as a result of being on bail. So far this is the history of this case.

Counsel Tambulasi has deponed in his affidavit in particular paragraphs 6 and 8. That the state has failed to take steps to prosecute the applicant which is infringement of applicant's right to a fair trial. In this regard this court should pronounce an order dismissing the action against him for want of prosecution. Section 42(2)(f) of the Constitution has been cited regarding fair trial. He also cited the Universal Declaration of Human Rights (UDHR) and also article 14(3) of the ICCPR regarding trial without undue delay.

The state through counsel Mrs Kachale strongly opposes the application. She prayed that the state be given opportunity to prosecute the applicant. She argues in paragraph 2 of her affidavit that since applicant is on bail he maintains a reasonable degree of independence and liberty. On paragraph 4 counsel contends that applicant compounded the delay by reason of his abscondment whilst on bail. Counsel also alluded to various personnel problems experienced within the legal department of the Malawi Defence Forces.

My starting point is to repeat without hesitation the cardinal principle that a person is presumed innocent until proven guilty by a competent court of law. Hence the applicant is presumed innocent. Again it is observed that on 30th June, 2007 this court granted bail to applicant on stated conditions. He is currently enjoying liberty as a result of being on bail.

Counsel for the applicant has argued that delay to prosecute him has infringed his right to a fair trial under section 42(2)(f) of the Constitution. It is pertinent to reproduce it.

“42(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-

(f) as an accused person, for a fair trial, which shall include the right

(i) to public trial before an independent and impartial court of law within a reasonable time after having been charged.”

I also reproduce article 14(3) of the International Covenant on Civil & Political Rights (ICCPR):

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(c) To be tried without undue delay;”

Similarly, article 10 of the Universal Declaration of Human Rights re-affirms the principle of a fair and public hearing by an independent and impartial tribunal (court).

The applicant accuses the state for delaying to prosecute him without justification. This court is being called upon to discharge him from further prosecution on the criminal charges against him.

Well, the state on the other hand argues that the applicant contributed to the delay by jumping bail. I do observe that applicant was at large from August, 2004 to June, 2006. A period of almost 2 years. Not only that he fraudulently obtained another passport. These allegations have not been disputed by applicant.

Applicant was re-arrested on 13th June, 2006. He was immediately incarcerated until 30th June, 2007 when he was again re-admitted to bail. The question is why they failed to prosecute him. The explanation that the legal department experienced personal capacity hiccups is not convincing.

The inordinate delay to prosecute applicant is inexcusable. It infringes on applicant's right to fair and speedy trial. To

blame the delay on applicant's jumping bail is tantamount to punishing him without trial for jumping bail.

Having found that the state is not justified for the inordinate delay to prosecute applicant. Do I proceed to discharge the applicant as prayed. It would be unreasonable, in my view, to grant an absolute discharge in disregard of the serious criminal offences he is alleged to have committed. The best course of action, had he been still in custody, was to admit him to bail. That has already been taken care of. He is on bail.

The state is urged in strong terms to expedite prosecuting applicant. Should there be a change of circumstances applicant to be at liberty to present another prayer.

Application dismissed.

Pronounced in Chambers on this 20th day of February, 2008 at Lilongwe.

R.R. Chinangwa
J U D G E