IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC. CRIMINAL APPLICATION NO. 35 OF 1996

CLEMENCE MASITALA

VERSUS

THE REPUBLIC

CORAM : NDOVI, J
Mwenelupembe, Deputy Chief State Advocate
Kalembera, Legal Aid Advocate
Chilunga, Official Interpreter

R U L I N G

This is an **inter parte** application by **Clemence Masitala** for an order that he be granted bail pending trial on such conditions as the court deems fit. The application which is brought under Section 42(2) of the Constitution and Section 118 of the Criminal Procedure and Evidence Code is supported by an affidavit.

The accused was arrested on the 10th day of March, 1992, at Kamala Village at Magomero on the allegation of murder of **Mrs Hapara**, his mother-in-law.

In June, 1996, the accused appeared before the Chief Resident Magistrate's court at Zomba. He pleaded not guilty and was committed to the High Court for trial. He has not been brought to the High Court for trial since his arrest 4 years ago.

The High Court has **jurisdiction** to grant bail in any case: See **McWilliam LUNGUZI -V THE REPUBLIC MSCA Criminal Application No. 1 of 1995** the Chief Justice, R.A. Banda, stated

> "First we would like to make clear beyond any doubt that the High Court has power to release on bail a person accused of any offence".

This view was also expressed by **Mwaungulu J** in the case of **THE REPUBLIC -V- CHRISTOS DEMETRIUS YIANNAKIS Crim. Case No. 209 of 1994:**

By Section 42(2)(e) of the Constitution "every person arrested and accused of an offence shall, in addition to the rights he has as an accused person, have the right to be released with or without bail unless interest of justice require otherwise". This is also emphasized in Section 42(2)(b) of the Constitution that he shall be released as a matter of right unless interest of justice require otherwise. In **MUHAMMAD YASINI**

-V- THE REPUBLIC Misc Crim. Appeal No. 12 of 1978 (unreported) quoted from a Book on Laws Relating to Bail in Tanzania by J.M. Itemba Dar-ES-Slaam Univerity Press 1991 where Justice Mwesiumu said, "Bail is a right rather than a privilege unless the Court is convinced that to grant it will defeat the ends of justice, such as failure by the accused to appear before the court to stand trial or that he will tamper with the investigations, witnesses or the exhibits which will be tendered in court at the time of trial".

The paramount consideration is whether the accused will appear at the appointed date for hearing: Re ROBINSON 1954 23 LJ QB 286. at page 287 Coleridge J. said "the test in my opinion is not whether a party ought to be released rather whether it is probable that the accused will appear at the date of trial". In REX -V- HAWKEN, 1944 2 DRLR FERRIS C.J. held, "that in any case it is the view of this court that it is not only the right but the duty of the judge before whom an application for bail is made for a person who is committed for murder to examine the evidence taken at the preliminary hearing. If the evidence is so weak that there is little chance of a conviction and the circumstances are such that there is no chance for the accused failing to appear if bail is granted, then bail could be granted". I entertain no doubt in my mind that the accused will appear at his trial.

The general principle is that the accused is presumed innocent until proven guilty: Section 42(2)(f)(111) of the Constitution refers. According to the case of THE REPUBLIC -V- CHRISTOS DEMETRIUS YIANNAKIS Crim. Case No. 209 of 1994 it was stressed, "that custody should not be used as a means of punishing a person". The accused had been in custody for only 6 months and the judge held that this was excessive. Equally in the case of S -V- Acheson 1991 SA(2) 505, 7 months was held to be excessive, especially where it is uncertain as to when the accused will be brought to court for trial. In the present case, the accused has been under continued incarceration without justification since 1992. In JOHN ZENUS UNGAPAKE TEMBO AND OTHERS, Crim. Case No. 1 of 1993 the learned judge MWANGULU said, at page 9 "an arrest or detention is unlawful unless justified. It can be in the interest of justice to a man accused of an offence to be detained. The onus is upon the state to show that bail should not be granted". In the present application obviously 4 years is inordinately long for the accused to remain in custody without trial. This is an example of a case where it can be said without being ambivalent that it is a form of punishment. In C.T. KADZAMIRA -V- THE REPUBLIC Misc. Crim. Application No. 37 of 1996 (unreported) Tambala J. had this to say "pretrial arrests and detentions must not be taken as a form of punishment meted out to the suspects". It is for this reason that Section 42(2) of the Constitution has stipulated for 48 hours within which time the accused should be brought before a Court of law of competent jurisdiction to be dealt with according to law. I am mindful of the fact that the new Constitution only became operational on the night of 18th May, 1994 and that the

accused was arrested before that time. I still consider the two years from June 1994 to be far too long a time to keep an accused person in prison without trial. The State should have moved consonant to the provision of the New Constitution.

It has been said that the onus is on the state to show cause why the accused should not be granted bail. **Mr. Mwenelupembe** representing the State conceded that it is true that the accused was arrested on 10th March, 1992 and that he was only committed to the High Court for trial on 24th November, 1995, almost 3 years after his arrest. He further intimated that the State is ready to prosecute but that he has received no indication from the court as to when the matter will come up for hearing. It is common knowledge that these homicide cases were discontinued because of lack of funding. He continued, yes, the accused has been in custody for 4 years, but it is not known when he will be tried. He agreed that this amounted to a violation of the accused constitutional rights. He stated that the accused is presumed innocent until proven guilty and has the right to be taken before a court of law of competent jurisdiction to be dealt with according to law within a reasonable time. Certainly 4 years is not a reasonable time. Therefore, he concluded that the State did not have any objection to this application. He stressed that the allegation of murder is a very serious allegation. It carries a mandatory death sentence upon conviction and therefore proposed some conditionalities upon which bail shall be granted. I am indebted to both counsels in this matter for their very clear and helpful submissions.

Against the above background, and having regard to the fact that the State does not object to the accused being granted bail, I grant bail to the accused on the following conditions. That he surrenders his travel documents if any. That he produces two satisfactory surities to be bonded in the sum of K1000 each not cash. That he reports to the nearest police officer in charge of a station twice a week on Mondays and Fridays, and finally, that he should not leave his district without informing the police first.

MADE in Chambers on the 10th day of September, 1996 at Blantyre.

L.B.T Ndovi
JUDGE