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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

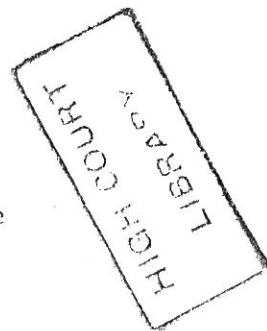
MISC. CRIMINAL APPLICATION NO. 34 OF 1996

HARRY SONE MACHIKA

- VERSUS -

THE REPUBLIC

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



R U L I N G

This is an application by one Harry Sones Machika, for an order that he be granted bail pending trial within such limits as the court may direct. The application is supported by an affidavit and is brought in terms of section 42 (2) of the Constitution and section 118 of the Criminal Procedure and Evidence Code.

The applicant was arrested on the 2nd day of September, 1995 in Machinga in connection with the death of one, Sauka Chiromo. Since his arrest he was only brought before the Chief Resident Magistrate's Court at Zomba for plea on 6th day of August, 1996. This was after nearly a year in custody not only without trial but without being brought before a court of competent jurisdiction to be dealt with according to law.

When he was brought before the court at Zomba, he pleaded not guilty to a charge of murder and was there and then committed to the High Court for plea and trial. Since then the state has taken no action, which is why he appears before this court for an application for bail to day.

In terms of section 42 (2) (e) of the Constitution "every person arrested or 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 interests of justice require otherwise". In addition, under section 42 (2) (b) of the Constitution, he shall be released as a matter of right unless interest of justice require otherwise.

It has been held that under section 118 of the Criminal Procedure and Evidence Code, the High Court can grant bail in all

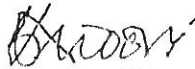
cases: **Christos Demetrius Yiannakis** Misc. Application No. 409 of 1994 per Mwaungulu J. who said at page 3, "that section 118 of the Criminal Procedure and Evidence Code subsections 1 and 3 are said to be in conflict. In this case interpretation of this section is in issue in so far as it is contended that bail will not be granted if the charge is of capital offence". The learned judge was loathe to accept the contention that the High Court cannot grant bail where the punishment for the offence the accused person stands charged is punishable by death. The bottomline therefore is that the High Court has jurisdiction to grant bail in homicide cases: See **McWilliam Lunguzi - v - The Republic Misca Criminal Appeal No. 1 of 1995** at page 3 "we would like to make quite clear that the High Court has power to release on bail a person accused of any offence. It is for the state to show cause why it would be in the interest of justice not to release the accused on bail." What is interesting in the case before this court is that Mr. Mwenelupembe, representing the state said, "that there is no file with the state. I requested police to provide me with one. They also state that they cannot trace the file. So there is no basis on which to agree or refuse the granting of bail. That is all". At page 2 of the Lunguzi Case supra it was stated "that it is up to the applicant, especially in murder cases, to show special circumstances which would justify releasing him on bail."

The state has not shown any cause why it would be in the interest of justice not to release the accused on bail. On the other hand, the applicant has shown special circumstances which would justify releasing him on bail, namely, that he had been in custody for nearly 12 months without trial. That the file is lost by the state who are the aggrieved party and that one cannot say with certainty as to when the matter may come up for trial. The court also takes judicial notice of the fact that trials of homicide cases were discontinued for lack of funds. These are special circumstances which, among others, persuade this court to grant the accused bail. It has been said that the paramount consideration in granting bail is that the prisoner should stand trial **McWilliam Lunguzi - v - The Republic MSCA Criminal App. No. 1 of 1995**. The applicant is a Malawian citizen and resides in Malawi in Machinga District where he is married. He is not a holder of a Malawian passport, he may not therefore cross the border because if he did so and was arrested there, he would be deported back to Malawi. The court should always consider whether there are special circumstances to warrant granting bail: **S. - v - Acheson 991 8A (2) 505**, a Namibian case where the accused was arrested on 12th September, 1989 for murder of a prominent member of SWAPO. On 13th November, 1989 he unsuccessfully applied for bail. On 10th January, 1990 he unsuccessfully appealed. Bail was granted on 18th April, 1990 only after 7 months in custody, because it was not clear as to why the accused had been in custody since September, 1995. In the application before me, the accused was committed to the High Court in August, 1996 but up to now it is not clear as to when he

might be brought to court for trial: See *The Republic - v - Christos Demetrius Yannakis* Crim. Case No. 209 of 1994, my learned brother Justice late Mbalame was of the view that 6 months in custody without being brought to trial was excessive. This was also a murder case. At page 5 he stated "sight should not be lost of the fact that when a man is accused of an offence is nevertheless presumed innocent" also see **Section 42 (2) (f) (iii) of the Constitution**. It was said the object of keeping one in custody prior to trial is not on the theory that he is guilty, but on the necessity of having him available for trial. In the present application there is no prospect of speedy trial as can be gleaned from what the Deputy Chief State Advocate said. There is no evidence of the record of committal proceedings on the file, hence it is not possible to know how strong the available evidence against the accused is. There is no evidence that the police had completed their investigations or not. There is no evidence that if released on bail the accused will interfere with witnesses or exhibits.

Taking all the above special circumstances fully into consideration including the fact that the docket is lost, I am convinced and satisfied that this is a suitable case where the accused ought to be discharged. After a long and anxious research into the Criminal Procedure and Evidence Code and the Courts Act, the court was unable to find any provision that confers powers on the High Court to discharge an accused in these circumstances. Consequently, I grant the applicant bail on the following conditions. That he be bonded on his own surity in the sum of K1000 not cash, that he reports to the nearest police station to the officer-in-charge twice a month on Mondays for 2 months. At the end of those 2 months if the police do not find the docket or bring him to court for trial, he shall be presumed discharged.

MADE in Chambers this 11th day of September, 1996 at Blantyre.

  
L. B. T. Ndovi  
JUDGE

