

**IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
MISCELLANEOUS CRIMINAL CAUSE NO. 29 OF 2016**

**IN THE MATTER OF SECTION 118 AND 161G OF THE CRIMINAL PROCEDURE
AND EVIDENCE CODE**

AND

**IN THE MATTER OF SECTION 42(2)(e) OF THE REPUBLIC OF MALAWI
CONSTITUTION**

BETWEEN

EDSON MANYOWA MHANGO APPLICANT

AND

THE STATE RESPONDENT

CORAM

Z NTABA, J.
Mr. P. Chinguwo, Counsel for the Applicant
Ms. M. Munthali, Counsel for the Respondent
Mr. D. Banda, Court Clerk

Ntaba J.

RULING

1.0 BACKGROUND

- 1.1 The High Court, State Advocate Chambers, Legal Aid Bureau, Malawi Prison Services and the Paralegal Advisory Services noted that the number of homicide remandees in the Eastern Judicial Region was alarming embarked on prison camp courts in order to hear bail applications. The parties agreed that for these bail applications to take place within the bail premises on
- 1.2 The court decided that during this process it will allow for both the Applicant and State to make oral applications and submissions instead of sworn affidavits. Notably the State and PASI verified the facts relating to the date of the offence,

where the offence took place as well as the particulars of the deceased, offender as well as the stage of the investigations. The rationale for these applications and bail camp courts were to ascertain the number of homicide remandees who have who have been in remand for more than the required statutory period and see if prison service which is overcrowded could be relieved. Furthermore, it was an opportunity for those accused person on remand to have an opportunity to be brought before court and be dealt with. Lastly, it was to allow the justice system to take stock of cases which might be speeded to trial.

- 1.3 The applications were brought under section 42(2)(e) of the Republic of Malawi Constitution as well as sections 161G and 118 of the Criminal Procedure and Evidence Code.

2.0 THE BAIL APPLICATION

- 2.1 The Applicant, Edson Manyowa Mhago aged 63 and hails from Mwatakata village under Traditional Authority Chimwala in Mangochi district. The Applicant highlighted that when he was arrested in August, 2010, that is, more than five (5) years. He also highlighted that there is no record that his case heard. He argued that since his arrest he has not been brought to court to be tried and it was his assertion that he has overstayed in custody and thus being a violation of section 161 of the Criminal Procedure and Evidence Code. He therefore prayed for the court exercise its discretion and grant him bail pending trial.
- 2.2 The State in response indicated that the facts gathered indicated that he was arrested on 26th August, 2010 on allegations that he had caused the death of Lucy Mhango Chikopa aged 40 who hailed from Chigonera village under Traditional Authority Nankumba in Mangochi District.
- 2.2 The State indicated that they were not objecting to bail as there were no factors to show that it would be against the interest of justice to release the Applicant on bail. They did however correct the position on the date of arrest by stating that the offence was committed on 22nd June, 2008 however the Applicant had escaped and was only rearrested in August, 2010.

3.0 COURT'S DETERMINATION

- 3.1 This court recognizes that the constitutional right to bail is enshrined in section 42(2)(e) of the Malawian Constitution. Malawian law also recognizes that the right to bail is not an absolute right and is subject to limitations of the interests of justice. Their Lordships in the *Fadweck Mvaha v Republic*, Misc. Crim. Apl. No. 25 of 2005 stated that –

“Just to recapitulate, we have indicated that it is common ground that the High Court has power to release on bail any person accused of any offence including murder. We have indicated also that it is common case that the right to bail stipulated in section 42(2)(e) of the Constitution is not an absolute right; it is subject to the interests of justice.”

- 3.2 Courts, therefore must be mindful that in dealing with bail applications, they should ensure and remember that the interest of justice is fundamental and that all circumstances of the case should be weighed against this fundamental principle. Secondly, such interest should be carefully examined and properly balanced for both the State and the Applicant. This court is very aware that the granting of bail is further restricted by the court's discretion after examining all the issues laid before it. Notably, this balancing act is the court's duty and should be exercised by taking into account the Constitutional provisions as well as all other legal requirements.
- 3.3 In this application, the first issue would be pretrial custody. The Criminal Procedure and Evidence Code has set down in section 161G that pretrial detention for homicide suspects shall be ninety (90) days and after the elapse of the said period, the State has to petition the court requesting for an extra thirty (30) days. Notably in terms of the Applicant herein, it has been indicated that he arrested on 20th August, 2010 thereby confirming that he has overstayed on remand.
- 3.4 Furthermore the Bail Guidelines Act have in Guideline 4 of Part II, stipulates that –

The principles which the court should take into account in deciding whether or not bail should be granted include the following—

- (a) the likelihood that the accused, if released on bail, will attempt to evade his or her trial; and in considering this principle the court may, where applicable, take into account the following factors—
- (i) the nature and the seriousness of the offence for which the accused is to be tried;
 - (ii) the strength of the case against the accused and the temptation that he or she may in consequence attempt to evade his or her trial;
 - (iii) the nature and the severity of the punishment which is likely to be imposed should the accused be convicted of the offence against him or her;
 - (iv) whether the accused is in custody on another charge;
 - (v) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
 - (vi) the assets held by the accused and where such assets are situated;
 - (vii) the means and travel documents held by the accused which may enable him or her to leave the country;
 - (viii) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be fixed, thereby inducing him or her to jump bail;
 - (ix) whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial; and
 - (x) any other factor which in the opinion of the court should be taken into account;

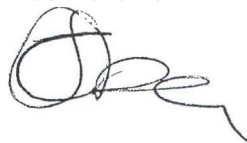
- 3.5 Markedly, the State has raised no objection stating that the facts and the law are in favour of granting of bail because firstly they have breached the statutory prescribed pretrial detention period. Secondly, the interests of justice are in favour of granting bail to the Applicant despite that he was on the run for two (2) years after he committed the offence.
- 3.6 This court after carefully examining the facts and law and coupled with the State's no objection. This court also recognizing that bail is a constitutional right although not absolute but available to all accused as long as the interest of justice require, this court therefore grants the Applicant his prayer.

4 ORDER

- 4.1 This court therefore orders that bail be granted.
- 4.2 The Applicant is therefore bound on the following conditions –
- 4.2.1 he pay a bail bond of a cash sum of K50,000.00 into Court before being released;
- 4.2.2 he produce two (2) sureties and each surety to be bonded in the sum of K100,000.00 not cash. The said sureties be examined by the Registrar within twenty one (21) days of this order on a date and time to be fixed by her;
- 4.2.3 he report every Monday and Friday to Mangochi Police Station or his nearest police station (which station should be communicated to the court) except if required to report to Court on the same day;
- 4.2.4 surrender any travel documents to the said Police Station and not to leave the country without the written authority of the officer-in-charge of the Police Station;
- 4.2.5 seek written permission from the officer-in-charge of the said Police Station if they wants to travel outside Mangochi;
- 4.2.6 be bound to keep the peace and refrain from tampering with state witnesses; and
- 4.2.7 not commit any crime during the subsistence of his bail.
- 4.3 The State is further ordered to do all necessary issues for pretrial procedures including committal procedures if it was not done as plea taking shall take place at the High Court in Zomba on 28th July, 2016 at 09.00 hours

I order accordingly.

Made in chambers this 9th day of June, 2016.



Edson Manyowa Mhango

Z.J.V. Ntaba
Judge