



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
BAIL APPLICATION NO. 68 OF 2016

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

AND

IN THE MATTER OF SECTION 118 AND 161G OF THE CRIMINAL PROCEDURE
AND EVIDENCE CODE, CAP. 58:01 OF THE LAWS OF MALAWI

AND

IN THE MATTER OF SECTION 16(6)(a)(iii) OF THE STATUTE LAW
(MISCELLENEOUS PROVISIONS) ACT,

CHIKONDI KHEYA APPLICANT

AND

THE STATE RESPONDENT

CORAM : Z NTABA, J.
: Major Kamwendo on brief for Mr. P. Wame, Counsel for the Applicant
: Counsel for the Respondent Absent
: Mr. D. Banda, Court Clerk

Ntaba J.

RULING

1.0 THE APPLICATION

1.1 The Applicant, Chikondi Kheya stands accused of murder contrary to section 209 of the Penal Code. He was arrested around December, 2015 by Jali Police. He is 18 years old and hails from Malosi village under Traditional Authority Chikowi in Zomba district.

1.2 He filed an application for bail under section 42(2)(e) of the Constitution as read

with section 118(3) of the Criminal Procedure and Evidence Code as well as section 16(6)(a)(iii) of the Statute Law (Miscellaneous Provisions) Act. He indicated that he was once taken before the Resident Magistrate sitting in Mulunguzi and after which he is on remand at Mikuyu Prison.

- 1.3 He argued that he has been in custody beyond the pretrial custody limits which in his view is pre-trial punishment of a person who is presumed innocent until proven guilty. Furthermore, his right to a fair trial in terms of being charged and tried without undue delay has been taken away. Lastly, the interests of justice cannot be jeopardized by his continued incarceration.
- 1.4 The State did not file an affidavit in response nor did they appear at court to make an oral submission. I will keep making this statement until the State gets my message. I keep stating in a lot of the bail rulings I have delivered that the State's non response is a matter of concern. Their availability at court can be mitigated if they attempt to file documents in response to the application as such are of great assistance to the court in determination. The Director of Public Prosecutions is being reminded to impress upon her State Advocates, the role of the State in criminal matters as part of their duty to Malawians as being a fundamental aspect of their responsibilities.

2.0 THE LAW AND DETERMINATION

- 2.1 Malawi's Constitution has enshrined the right to bail in section 42(2)(e) of the and Malawian courts are very aware of this constitutional right and have applied it in numerous cases. However this court is also very aware that such right to bail is not an absolute right as it is subject to limitations of the interests of justice. Their Lordships in the *Mvaha* case 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."

- 2.2 The Bail Guidelines Act clearly states that the court when considering a bail consideration should take into account a lot of factors including how the offence was committed. It states in Guideline 4 (a)(v) of Part II that the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried are a significant issue for the court to take into when considering bail.

- 2.3 Furthermore, in Guideline 4(d) of the same Part, it states that –

in exceptional circumstances, the likelihood that the release of the accused will disturb the public order or undermine the public peace or security; and in considering this principle the court may, where applicable, take into account the following factors—

- (i) whether the nature of the offence or the circumstances under which the offence was committed is such that the release of the accused is likely to induce a sense of shock or outrage in the

community where the offence was committed, and whether the shock or outrage of the community might lead to public disorder if the accused is released;

(ii) whether the safety of the accused might be jeopardized by his or her release;

(iii) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused; and

(iv) any other factor which in the opinion of the court should be taken into account.

2.4 This court recognizes that homicide cases in Malawi take long to be prosecuted however, the fact that people continue to be on remand beyond legally stipulated time frames should be a cause for concern for every criminal justice player. It is imperative that we need to find better solutions otherwise we continue to breach the said rule of law we swore to protect and promote.

2.5 In this matter, I have carefully considered the facts and the law and realizing that bail is constitutionally guaranteed to everyone. Cognizant that although available to homicide suspects, it is not absolute but contingent on the interest of justice. In the case herein, the Applicant has been in custody for over a year as such making his pretrial detention beyond the prescribed statutory limit, I therefore find that the balance of justice lies in favour of granting bail.

3.0 ORDER

3.1 This court therefore orders that bail be granted. The Applicant is therefore bound on the following conditions –

3.1.1 he pay a bail bond of a cash sum of K15,000.00 into court before being released;

3.1.2 he produce two (2) sureties and each surety to be bonded in the sum of K50,000.00 not cash. The said sureties be examined by the Registrar on a date and time to be fixed by her;

3.1.3 he report every Monday to Jali 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;

3.1.4 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;

3.1.5 seek written permission from the officer-in-charge of the said Police Station if he wants to travel outside Jali;

3.1.6 be bound to keep the peace and refrain from tampering with state

witnesses; and

3.1.7 not commit any crime during the subsistence of his bail.

I order accordingly.

Made in chambers this 22nd day of December, 2016 .



Z.J.V. Ntaba
Judge