



THE REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
MISCELLANEOUS CRIMINAL CASE NO. 58 OF 2016

BETWEEN

RABSON MASAUTSO..... APPLICANT

AND

THE REPUBLIC RESPONDENT

CORAM : LADY JUSTICE I.C. KAMANGA

: Namasala, for the Applicant
: Ndyani/Chikankheni, Senior State Advocates
: Tembwe, Court Clerk

RULING

On 29th May 2016, the applicant in this matter, Rabson Masautso, moved the court on the hearing of an application that he be released on bail subject to the terms as the court might deem fit. The application was made under Section 42(2)(e) of the Constitution as read under section 118 of the Criminal Procedure and Evidence Code.

The applicant deposed an affidavit in support of the application. He stated that he was arrested on 9th April 2016 by Kasiya Police on allegation of his brother's death on 4th April 2016. His brother's name was Lemekezani Masautso. He indicated that he did not intend to provide the court with any details pertaining to his brother's death as he intended to exercise his right to remain silent. Suffice to state that he was seeking to be released from custody on bail pending hearing of the substantive charge. He also stated that at the time of his arrest, he did not resist the same nor did he devise any plan to bolt. He voluntarily went to Kasiya Police Unit upon receiving a summons to appear at the Police Station. He lamented that the State has failed to bring him before court to be tried. Hence interest of justice required that he be released from detention on bail with conditions as the court might deem fit.

The court heard the application on the said 29th June 2016 and noted that the pre-trial custody time limit for murder suspects is provided for in section 161 G of the Criminal Procedure and Evidence Code. The time limit is 90 days. Hence on 29th June 2016, the detention was legal. And the applicant had not demonstrated any exceptional circumstances for waiver. This court observed that the Legislature must have had a reason for provision of a ninety days pre-trial custody time. And the same could only be departed upon demonstration of exceptional circumstances. This demonstration would be a burden of the applicant and not the State as the detention was to all intents and purposes, a legal detention. Hence the prayer was not granted as the application was premature.

On 1st August 2016, the applicant moved the court on re-application to be released on bail pending trial. The applicant indicated that the pre-trial detention

limit had now lapsed and the State had not brought him to court for trial. He once again moved the court to be released from detention. The court, The Hon Justice Chombo ordered that the State should bring the applicant for plea on 15th October 2016. At this hearing, the applicant was represented by counsel Namasala. The State was not represented.

The court was moved again on 17th January 2017. It was a re-application for release on bail pending hearing. The applicant lamented that the State had not taken him before court. At this hearing the State filed an affidavit in opposition to the application. Senior State Advocate, Chisiza deponed that upon interfacing with Kasiya Police Unit he obtained information that on 4th April 2016, the deceased and his friends were allegedly mocking the applicant for having a child that was suffering from malnutrition. This made the applicant angry and a fight ensued between the applicant and the deceased. Some people stopped the fight and the deceased proceeded to his garden to work. The applicant took a panga knife and followed the deceased to his garden and hacked the deceased leaving him in a blood bath. The deceased was taken to hospital where he died upon arrival.

The State contended that there is overwhelming evidence against the applicant. It sought a specific date for trial. The applicant's counsel contended that the applicant should still be released from detention pending trial.

OBSERVATIONS AND DETERMINATION

Let me start by observing that the applicant herein has indeed overstayed in prison. This is but one of many cases in which murder suspects are languishing in prison without their matters being heard. It should be noted that the presumption of innocence is always in favour of a suspect until the court finds otherwise after a hearing.

The frustration that is being experienced by the criminal justice system, and the courts in particular, is that we are having a lot of applications to release murder suspects on bail pending trial. We are not having matters set down for hearing of the substantive cause. There are supreme judgments that have determined that pre-trial detention should not be a form of pre-hearing punishment on the suspect. It would appear that this is what is happening in the 2015-2017 financial year. In a lot of the incidence that the court have set down matters for plea, the court has been informed that the Legal Aid Bureau that provides legal services to most of the suspects has no financial capacity as it has not been funded to cater for homicide trials. It is interesting that there are some other donors who are willing to provide funding for release of murder remandees on bail regardless of circumstances of the homicide. These donors are not willing to provide funding to the Legal Aid Bureau to facilitate the hearing of the substantive actions. So when these donors fund counsels for release of applicants on bail, are they acting in interest of Malawian criminal justice? Interest of justice is not only interest of the untried murder suspects. It also applies to the interest of the victims and the

society at large. Justice should ensure that while suspects are not illegally incarcerated, the suspects should be brought before court so that a determination should be made on what led to the demise of another person. While the murder suspects have the right that is enshrined in section 42 of the Constitution, the deceased person equally had a right to life under section 16 of the same Constitution. As the donors provide resources towards appreciation of human rights, they should not engage in picking and choosing. They have to level the playfield. The selective provision of funds towards release of murders remandees and failure to provide funds for hearing the substantive actions would create a dangerous unwarranted and unwanted perception that our criminal justice system condones homicide. If donors can provide funding for release on bail, they should equally be moved to provide funding for homicide trials.

Another observation with regard to the matter at hand is that when the Hon Justice Chombo made the order for plea to be taken on 16th October 2016 the applicant's counsel should have firstly perfected the order and served the said order on the respondent, thereafter the applicant's counsel should have filed and served on the respondent a Notice of Hearing for plea taking.

The applicant's counsel did not take any action after the court order. It therefore becomes a challenge for this court to find that the respondent did not comply with the court order when there is no evidence that the respondent was served with the same.

Fortunately, the respondents' counsel is in attendance at this hearing. I will not release the applicant as per his prayer. I give directions as follows:

- Applicant be taken before the Chief Resident Magistrate court on 21st June 2017 for committal.
- The State shall appear before this court on 27th June to report on committal proceedings.
- The State to supply/furnish on the defence and the court the list of its intended witnesses for prosecution at trial and statement of the substance of evidence of each witness by 10th August 2017.
- The State and defence shall appear before this court to report on 16th August 2017, on the service of the documents and defence counsel to advise whether he will proceed with the matter at the substantive hearing.
- This matter is set down for hearing from 3rd to 5th October 2017.

I.C. Kamanga
JUDGE