



THE REPUBLIC OF MALAWI

**IN THE HIGH COURT OF MALAWI**

LILONGWE DISTRICT REGISTRY

Miscellaneous Criminal Appeal No. 33/2018

Syback Chibweya ..... Applicant

-VS-

Republic ..... Respondent

HCLL – OR BAIL – 371 – 2018

**CORAM : LADY JUSTICE I.C. KAMANGA**

: Matonga/Ndalama: Senior State Advocates

: Ndingo: Counsel for the Applicant

: Mrs Ngambi: Court Clerk

**RULING**

The applicant Syback Chibweya has moved this court on application that he be released from detention at Ntchisi prison on bail with or without conditions, or that he be brought before a court of law to be dealt with in accordance with the law. The application is made pursuant to Section 42(2)€ of the Constitution as read with section 118(3) and 1619 of the Criminal Procedure and Evidence Code as read with the Bail Guidelines Act, Schedule Part II.

The applicant deposed an affidavit in support of his application. He indicated that Mtiti Village is at a trading centre and they ransacked several houses. They also assaulted people in the process of invasion. When they invaded one of the houses, they hacked the owner who sustained severe injuries. He was taken to hospital where he died on 13<sup>th</sup> June 2017. The applicant was arrested in the evening of 13<sup>th</sup> June 2017 in connection with the death. He has been in custody ever since.

The State responded and objected to the release. It was indicated that as per injunction gathered after consultations with Police officer Chavula of Madisi Police, the deceased mentioned the name of the applicant to be the person that hacked him. And that the deceased died thereafter. Officer Chavula expressed concern that the villages in the community were still angry with the applicant and that there was commotion in the village after the deceased's demise. The Police Officer was apprehensive that releasing the applicant would cost his life.

THE LAW

Section 42 (2) (e) of the Constitution provides that every person that is arrested for the alleged commission of an offence shall have the right to be released from detention, with or without bail unless the interests of justice require otherwise.

Section 161 (a) of the Criminal Procedure and Evidence Code states that the maximum period that a person accused of murder may be held in lawful custody pending commencement of his trial in relation to that offence shall be ninety days.

The accused person herein was arrested on 13<sup>th</sup> June 2017. He has therefore been in custody for a period of eleven months. This is past the three months period that is envisaged in section 161 (a) of the Criminal Procedure and Evidence Code.

Apart from the Constitutional provisions and the Criminal Procedure provisions that are indicated above, there is the Bail (Guidelines) Act that indicates the principle that a court ought to take into consideration when granting bail. Part II of the Schedule to the Bail (Guidelines) Act indicate that the likelihood that suspect would attempt to evade his trial is a paramount consideration when considering whether an applicant should be released on bail. Applicant's counsel indicated that there is no such likelihood as the applicant has a permanent place of abode in Ntchisi.

The question that has exercised my mind is whether having a permanent place of abode and family ties is a sufficient motivation on the part of an applicant to



desist from evading trial. There are situations at which, even with such motivations, a person can evade trial. Applicant's counsel referred to the case of **Aubrey Mbewe and Simoni Pondani –vs- Republic.** {Criminal Appeal No. 11 of 1995} where Hon. Mtambo, J. noted that the primary consideration whether an accused should be detained pending trial is whether or not he will attend court for his trial whenever required to do so. The Honourable Judge further stated that the chief purpose for imposing conditions to bail is to secure such attendance. And he continued to state that:

*“this, in my view must always mean that whenever there is no doubt that an accused person will attend court, there should be no need for conditional bail, for why should there be.”*

A reading of this authority subject's one to conclude that release to bail, whether it be with or without conditions is not absolute. There are instances when bail may be refused. And as indicated by State Counsel, in *Republic v Chimthunzi Misc Criminal Case No. 46 of 2008*, Lilongwe District Registry, Her Hon. Chombo, J., the court must look into the interests of justice. Hon. Chombo, J. noted that once it is demonstrated that the interests of justice militate against the release of an applicant from detention pending trial, the application ought to be dismissed.

A look at Section 42 (2) (e) of the Constitution presents the scenario that a person that is arrested ought to be released from detention. The person ought to be released unless the interests of justice required otherwise. The circumstances in which the interests of justice require that the detained person should not be

included in the Bail (Guidelines) Act. They include the nature and seriousness of the offence and nature of penalty. It is presumed that the more serious the offence, and the more severe the likely penalty if an accused person is convicted, the more likely an applicant person is to evade trial. Where there is evidence to that effect, the applicant may be persuaded to disappear.

In the matter at hand, there is evidence demonstrated by the State that the applicant herein stabbed the deceased in the course of a robbery. Much as this is not the actual trial, the indication by the State that they do have evidence that can substantiate their position cannot be ignored.

The Part II Schedule to the Bail Guidelines Act under Guideline 4 (d) states that the court must consider the likelihood that the release of the applicant would disturb public order or undermine public peace and security. It is on record that the community was angry with the applicant whom they believe to have contributed to the demise of the deceased and that there was commotion in the community. This is an indicator that the release of the applicant would result in public disorder as the community might want to take the law into their own hands. This is another factor which ought to dissuade the court from allowing the release of the applicant.

Releasing the applicant to bail in the matter at hand would be adverse to the public interest and interest of justice. Interest of justice is double thronged, while appreciating that an accused person is presumed innocent until proven guilty; interest of just has to weigh the interests of the applicant on one hand and the

public interest on the other. The scales in the matter at hand persuade this court to determine that the applicant continues to be in custody pending trial with directions as follows:-

- The Applicant be brought before a court of law to be informed of his further detention within 21 days from the date hereof;
- The State prepares and serves disclosures and list of witnesses on the defence within 60 days from the date hereof.
- This matter is set down for hearing from the 6<sup>th</sup> to 10<sup>th</sup> of August 2018.

PRONOUNCED in Chambers at Lilongwe District Registry this ..... day of ....., 2018.

Kamanga, I.C. (Mrs)

**JUDGE**