

Library



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION**

HOMICIDE BAIL CAUSE NO. 51 OF 2017

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

AND

IN THE MATTER OF APPLICATION FOR BAIL PENDING TRIAL

BETWEEN:

MAGANIZO NYAKHUWA.....APPLICANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Mr Chisanga, Senior State Advocate, of Counsel for the Respondent

Mr Maele, of Counsel for the Applicant

Mr Kakhobwe, Official Interpreter

RULING

Kalembera J

This is an order on the Applicant's application for bail. The application is brought under section 118 of the Criminal Procedure & Evidence Code (Cap 8:01) of the Laws of Malawi as read with section 42(2)(e) of the Republic of Malawi constitution. The application is supported by an affidavit sworn by Fostino Yankho Maele, of counsel for the Applicant, as well as skeletal arguments. There is also an affidavit filed by the State and sworn by Samuel Chisanga, State Advocate, as well as skeletal arguments. The State is opposing this application.

The brief facts of this matter are that the Applicant hails from Nsona Village, T/A Mabuka in Mulanje District. He was arrested by Mulanje Police on the 27th day of January 2017 on allegations that he caused the death of Barton Malani Nyale of Nasiyaya Village, T/A Mabuka in Mulanje District. The Applicant is applying for bail pending trial. The main reason the Respondent is objecting to this application is because the Applicant's village is on the Mulanje/Mozambique border and chances of him fleeing into Mozambique and evading trial are high.

The main issue for the court's determination is whether the Applicant be released on bail or not.

As regards the applicable law, the starting point must always be the Constitution which is the supreme law of the land. Section 42 (2)(e) of the Constitution provides as follows:

"42 –(2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right –

(e) to be released from detention, with or without bail unless the interests of justice require otherwise."

Thus, the Applicant, just like any other person arrested for, or accused of the commission of an offence has a constitutional right to bail. But as both parties have rightly observed this constitutional right to bail is not an absolute right. It is subject to the interests of justice. In the now commonly cited case of **Fadweck Mvahe –v – The Republic, MSCA Miscellaneous Criminal Appeal No. 25 of 2005** the Supreme Court of Appeal buttressed the point as follows:

“.....the right to bail, which is stipulated in section 42(2)(e) of the Constitution, is not an absolute right; it is subject to the interests of justice. The Court in Lunguzi case expressed this principle in the following words: ‘In our view the right to bail section 42(2)(e) now enshrines does not create an absolute right to bail. The section still reserves the discretion to the courts and it makes the position absolutely clear that courts can refuse bail if they are satisfied that the interest of justice so requires.’”

What then constitutes the interests of justice? Lord Justice Mann in the case of **Rex –v –Monrovin [1911] Maun LR p.582** had this to say:

“Interests of justice require that there be no doubt that the accused person shall be present to take his trial upon the charge in respect of which he has been committed.”

The presence of the accused person before a court of law for trial is therefore, the primary consideration as to whether bail should be granted or not. However, this is not a standalone consideration. There are further principles and factors, which the court must also take into consideration. Section 4 of the Bail (Guidelines) Act (Cap 8:05) of the Laws of Malawi provides that principles which the Court must take into account in deciding whether or not bail should be granted must include the following: the likelihood that the accused, if released on bail will attempt to evade his or her trial; the likelihood that the accused, if he or she were released on bail will attempt to influence or intimidate witnesses or to conceal or destroy evidence; the likelihood that the accused, if he or she were released on bail, will endanger the safety of the community or any particular person, or will commit an offence; and in exceptional circumstances, the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

In considering the application of these principles certain factors come into play. The seriousness of the offence and its accompanying punishment if one is found guilty might lead an accused person to evade his/her trial. The more serious the offence, the higher the temptation to evade trial –see **Joseph Mpasu –v The Republic, Misc. Criminal Application No. 38 of 2003**. And that the stronger the case against the accused, the higher the temptation to evade trial –see **Republic –v- Langton, Misc. Criminal Application No. 148 of 2008**. In considering whether

the Applicant would interfere with witnesses or try to conceal or destroy evidence, the Court must consider, *inter alia*, the fact that the accused is familiar with the identity of the witnesses and their evidence; whether the witnesses have already made statements and agreed to testify; the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated; whether investigations are complete. If on a balance of probabilities the Respondent establishes that the Applicant will indeed, among other things, interfere with the witnesses and the investigations, or that the Applicants are a flight risk then bail has to be denied for it wouldn't be in the interests of justice to have the Applicants released on bail.

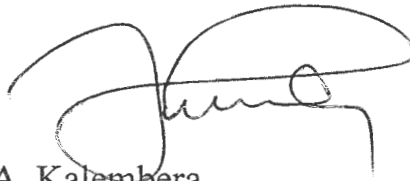
The only reason the Respondent contends that the Applicant is a flight risk is because his village is in the border between Malawi and Mozambique. If the courts were to follow this reason then the rights of those living in villages bordering surrounding countries, in so far as the right to bail is concerned, would be prejudiced and breached. The Respondent ought to do more to demonstrate that the Applicant is a flight risk. An allegation alone without any evidence does not suffice.

Thus, it would not be in the interests of justice to continue with the Applicant's incarceration pending trial. I therefore grant the Applicant bail on the following conditions:

1. That the Applicant must be bound in the sum of K30,000, cash.
2. That the Applicant must furnish the court with two satisfactory sureties who must be his blood relations and must be bound in the sums of K100,000 each not cash.
3. That the Applicant must surrender his travel documents if any with the court.
4. That the Applicant must be reporting to the O/C Mulanje Police once every Fridays.
5. That the Applicant must not leave Mulanje District without the permission of the O/C Mulanje Police Station.
6. That the Applicant must avail himself before this court sitting at Mulanje on the 9th day of August 2018, at 9:00 am for plea and directions.

The sureties must be examined by the Registrar.

PRONOUNCED this 5th day of June 2018 at the Principal Registry, Criminal Division, Blantyre.

A handwritten signature in black ink, appearing to be 'S.A. Kalembera', written over a horizontal line.

S.A. Kalembera

JUDGE