



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

**HOMICIDE CASE NO. 117 of 2017**

**JOSEPH DZILIMBE**

**V**

**THE REPUBLIC**

**Coram: Hon Justice M L Kamwambe**

Penama of counsel for the Accused

Francisco of counsel for the State

Amos ...Court Clerk

Mombera...Court Reporter

**RULING ON BAIL**

Kamwambe J

The accused applied for bail. The State objects to the application because the applicant is a flight risk. The time the co-accused was arrested, the applicant run away only to be apprehended in Mozambique in August, 2017. Facts of the case are that on the 4<sup>th</sup> May, 2017 the deceased and the applicant together with his co-accused, Yusuf Fulaye were drinking beer together when disagreements arose. A fight ensued against the deceased. The owner of the drinking place took the deceased person to his house, but the applicant and co-accused followed him there and continued fighting him. The co-accused held the

deceased while the applicant stabbed him on the neck. The deceased then crawled to his brother's house where he died.

Section 161G of the Criminal Procedure and Evidence Code states as follows:

*"...the maximum period that a person accused of treason, genocide, murder, rape, defilement and robbery may be held in lawful custody pending commencement of his trial in relation to that offence shall be ninety days."*

From the time he was arrested to this day, his custody is unlawful because he has exceeded the lawful custody time limit. In *Matthews Suwedi v The Republic*, Homicide Cause No. 240 of 2018 (HC) the court specifically said that as soon as the lawful custody time limit has been exceeded, the incarceration becomes unlawful. It further said:

*" For the sake of clarity, the court still exercises its discretion in the face of section 161 of the Code only that this time around, the applicant has a strong legal position....which will incline the court to exercise its discretion in favour of the applicant, unless the State otherwise shows the interests of justice for further incarceration. "*

The applicant has a strong legal position because of the presumption of innocence on his part.

In the case of **Willie Texan and Hilda Texan** Homicide Case No. 15 of 2018 (HC), the court had this to say:

*"Consideration of the liberty of the accused person is of paramount importance in accordance with section 18 of the Constitution which grants every person the right to personal liberty. Once the 90 days have elapsed further detention becomes unlawful unless sanctioned by a court of law. This puts the State on its toes to see to it that no one is in custody after 90 days lawful custody period otherwise the court shall not hesitate to release the suspect on bail. The State should therefore desist from being reactionary but should initiate action before the court as to why the accused person should continue to be held in custody at the expense of his liberty well after expiry of the period. Custody time was deliberately legislated to fight impunity of the State which managed accused persons slothfully thereby jeopardising the rights of accused persons. I believe those days are now gone. The law gives suspects an*



early opportunity to be considered for release and prevents prisons being dumping places while the executive fails to manage suspects."

In the case of **Manlid Bamusi & 2 others v Rep** Bail Application No. 8 of 2013 (HC), the Court said:

*"I should hasten to say that section 161G & H are mere statutory provisions which are subordinate to the Constitutional provisions under section 42 (2), especially sub-section (e) which provides for the interest of justice as one which can justify denial of bail. This should be regardless of the fact that the 90 days limit and the legal extension thereto have expired. As such, release is not automatic upon expiry of the 90 days limit. So, the court must exercise its discretion by considering with diligent circumspection the interest of justice. However, the 90 days limit should not be disregarded willy-nilly as it plays an important role of checking the conduct of the State towards murder remandees."*

In the case of **George Musankhe v Rep** MSCA Criminal Appeal No.9 of 2018 the Supreme Court said:

*If the intention was to prosecute the appellant while in custody, the State could only do so within the 90 days or further extensions of only 30 days, if the State applied before the expiry of the 90 days.*

The above seems to say that if the State fails to request for an extension as procedure dictates, and the lawful custody period has expired, the court can proceed to release the accused without hearing the State. This means that release on bail is automatic and the justice of Appeal said so.

In the case of **Amusa Kanjala v Rep** Miscellaneous Criminal Case No. 48 of 2017 (HC) the court said:

*"In my view, regardless of the failure to comply with section 161J of the CP&EC, the court is supposed to consider the interests of justice. It is not automatic that upon the expiry of the statutory custody period, the applicant becomes entitled to release at all cost. One may wish to think so, but it is not the case. In a bail application of this nature, expiry of custody period is an important consideration, but the court must take into account other factors. Section 161I seems to support this thinking (by the use of the words: 'the court may')."*

The State did not refute that the custody was unlawful after its expiry but prayed that the applicant be not released due to the

overwhelming evidence. The case was ready for trial. The deceased was selling maize at a market at Machinjiri. Applicant invited him to his house to give him money for the maize he bought from him. At his house applicant axed the unsuspecting deceased person in the head to death in cold blood and used deceased's phone to call deceased's wife that her husband has made an accident at Mbulumbuzi. The wife went there and found no accident. The accused took away MK65, 000.00 the deceased had in his pocket. Through the phone he was traced and arrested. The court denied him bail.

In this case counsel for the accused says that release on bail is automatic and the State says otherwise because the court has to consider the interests of justice anyway

By looking at the case docket which is ready, this court is convinced that there is overwhelming evidence which entices me to hesitate to grant bail. However, this alone is no good reason to continue incarcerating the applicant if the system does not expedite the hearing of the case. If the case will take longer time to be held then it is justified to release him. I have decided to expedite the case so that as a partly heard case, hearing is continued on the 26<sup>th</sup> day of July, 2019 at Chikwawa magistrate court. As such, bail is denied.

**Pronounced** in open court this 10th day of July, 2019 at Principal Registry, Chichiri, Blantyre.

  
M L Kamwambe

**JUDGE**