



**REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 29 OF 2019

MOHAMED SHAHIN MAHOMED IQBAR JUMA APPELLANT

AND

THE REPUBLIC RESPONDENT

Coram : **Honorable Mrs. Justice F.A Mwale**
 Mr. I. Kubwalo, Counsel for the Applicant
 Mr. C. Mpandaguta, Official Interpreter

Mwale, J

RULING ON BAIL APPLICATION

1.0 Background and facts

1.1 The summons for bail, currently before me, was originally heard on 1st July 2019 by Honourable Kamanga, J. Before she could deliver her ruling, she became aware that the substantive matter that the applicant is facing was in progress before my Court. Consequently, on 16th April 2020, the learned judge referred the matter to me so that I should be seized of both matters.

- 1.2 The summons is supported by a number of sworn statements. One deponed to by the applicant himself, another by applicant's counsel, Mr. Kubwalo, and another by the applicant's brother Mr. Riaz Mahomed Iqbal Juma, brother of the applicant who is based in Leicester in the United Kingdom.
- 1.3 The applicant seeks to be released on bail following his arrest on 20th December 2018 on suspicion of the murder of his wife at her residence on 19th December 2018. The facts of the matter according to his sworn statement, briefly, were that the applicant and the deceased were married and had three children. Some time prior to the incident, the applicant had developed an addiction to Indian hemp which led to the couple's separation. The applicant sought professional help at a Rehabilitation Centre in India in October 2017 and returned to Malawi in January 2018 after he was convinced that he was now free of the addiction. He was subsequently employed by SOS Construction, overseeing a project in Salima. He reconciled with his wife and used to visit her regularly in Area 9, from Salima where he was based. On the night in question, he arrived at his wife's home at around 19:30 hours, spent time with before he was back in Salima by 22:40 hours because he had an assignment to commence by 23:00 hours. The applicant avers that he only learned about the death the next morning when the body was discovered and was thereafter arrested on suspicion for causing the death of his wife.
- 1.4 By way of background, there have been a series of applications extending pre-trial custody in this matter. On 2nd April 2019, the State moved the Court to extend the applicant's pre-trial custody, applying under section 161H of the Criminal Procedure and Evidence Code (CP&EC). At the time of this application, the State had sent samples which it had collected from the scene of the crime to South Africa for analysis and was awaiting results. The extension of 4 weeks was granted by the Court on 2nd April 2019.
- 1.5 The applicant then applied for release on bail and the hearing was set down for on 28th May 2019, after the pre-trial incarceration extension granted by the Court had expired. The arguments put forward by the applicant for his release in that application were that:

- (a) The State had had enough time to investigate the matter and so the question of interference with the witnesses did not arise.
- (b) The applicant had so far cooperated with the authorities to the fullest.
- (c) The applicant is gainfully employed and will be moving to Mzuzu where his work is now located.

The applicant also deponed to the fact that although he is a British national and a Malawi Permanent Residence Permit holder. He has however been unable to trace his British passport since November 2018 and he exhibited confirmation from the Malawi Police Service that the passport was reported lost on 12th March 2019.

2.0 The Arguments

2.1 The State opposes the grant of bail mainly on account of the strength of the evidence against the applicant and the advanced stage at which the case is. It is the State's case *inter alia*, that the evidence indicates that the relationship between the applicant and the deceased had soured and the two were actually separated, the applicant living in Salima at the material time. The State further argues that the applicant drove off the compound hurriedly and according to the statement of Esther Bikiere, which was exhibited, that he drove off as though "he was chasing a thief". The next morning the body of the deceased was found in a pool of blood after the door was forced open.

2.2 The applicant has sworn a statement in reply, rebutting this averment with the aid of the witness statement of Mr. Abdul Jabbar Akbanie, father to the deceased whose evidence was that the deceased had agreed to travel to Blantyre with the applicant the day after her demise, an indication that the relationship had not soured. The applicant also reiterates that the couple had reconciled as per the contents of the sworn statement of his brother Riaz Mahomed Iqbar Ghumra. The applicant further avers that he asked the maid to knock off as was normal practice in the household and that he did not leave immediately after dismissing the maid for the day but stayed around long enough to pack clothes for the trip to Blantyre and even made love to his wife. The applicant also denies driving off in haste due to the manner in which cars were parked in the compound. It is also his argument that the kitchen door was found wide open which discounts the theory that nobody could have gone into the house after he left. The applicant therefore doubts the strength of the State's case.

3.0 Court's Reasoned Determination

3.1 The starting point in any bail application is that every person accused of committing an offence, is entitled to be released on bail under section 42(2)(e) of the Constitution “unless the interests of justice require otherwise”. The qualifying factor of the interests of justice is repeated in guideline 1, in Part II of Schedule 3 of the Bail Guidelines Act which by which an accused person may be released on bail “unless the court finds that it is in the interests of justice that he or she be detained in custody”. The power to grant bail extends to all offences, including murder (*Fadwick Mvahe v The Republic, Miscellaneous Criminal Appeal No. 25 of 2005*). As I reasoned in the case of case of *Arnold Folande v The Republic, Miscellaneous Criminal Application No.136 of 2015*, the expression “unless the interests of justice require otherwise” and “unless the court finds that it is in the interests of justice that he or she be detained in custody “in section 42(2) (e) of the Constitution and guideline 1, in Part II of Schedule 3 of the Bail Guidelines Act respectively, mean that the presumption of entitlement to bail may be rebutted. In order to rebut the presumption, it is necessary to show that the interests of justice require that an applicant for bail be denied bail. Because the presumption operates in favour of a defendant, it is generally up to the prosecution to rebut the presumption with reference to any of the principles set out in guideline 4 in Part II of Schedule 3 of the Bail Guidelines Act.

3.2 Primarily the interests of justice seek to ensure that the applicant if released on bail will avail himself or herself to court when called upon to do so. It therefore stands to reason that arguments strong evidence against the applicant will weigh against him or her as the likelihood that he or she may abscond is increased. Considering that in a bail hearing the standard of proof when considering the strength of the evidence as it is in the substantive matter, the argument has been sufficiently countered by the defence which has provided able arguments on this issue. The State has however also argued that the case is at an advanced stage, and such arguments must be considered in the light of the presumption of innocence that the applicant constitutionally enjoys. The applicant has a place of abode and a secure job which indicates some level of stability. This then leaves the Court to consider, whether the factors tilt the balance of the scales of the interest of justice in favour of the applicant. There are other reasons besides the strength of the evidence and the proof of residence and stability of the

applicant that may cause a Court to doubt whether a person accused of an offence would avail himself for trial if granted bail. In the case at hand, the applicant is not a Malawian national. He holds a British passport which he cannot surrender to the Court because it is lost.

3.3 The loss of the passport and the evidence surrounding it brings some doubt about the applicant's intentions. The letter from the police that the applicant has exhibited is dated 12th March 2019. It states as follows:

TO WHOM IT MAY CONCERN

This letter serves as confirmation that Mr. Mahomed Arif Mahomed Hussein D.O.B 13/07/1972 (56 yrs), Nationality British/Malawian Occ. Contractor C/O Box 20666 Mzuzu_Malawi reported British passport No GBR524782333 which was issued on 23/07/17 and was expiring on 23/11/2027 in the name of Juma Mahomed Shahn Juma Iqbal got lost during the month of November, 2018 in the City of Lilongwe.

Investigations were convinced out but nothing fruitful achieved. However your assistance to be bearer of this report is appreciated.

The passport was allegedly lost in November 2018, yet the applicant has taken over a year to report its loss. It has taken the applicant's relative to report the loss in the time that the applicant is in custody. The applicant returned from drug rehabilitation in India in January 2018. He used the passport in January 2018 and but somehow didn't notice it had gone missing until November 2018 when he was in custody. This piece of evidence cast grave doubts in my mind. The letter from the police does not give any details as to under what circumstances the passport was lost and why the applicant himself never bothered to report the loss when he had the opportunity. It only became necessary to report the loss after he was incarcerated when he knew that to be released on bail, he would be required to surrender his passport. This signals to me that the applicant's intentions are far from honourable. The letter cannot be taken as proof of the loss of the passport only as proof that the lost passport was reported as lost. The applicant is therefore a flight risk and in these circumstances, the interests of justice would not favour the grant of bail.

3.4 Further, in view of the fact that this court is about to rule on whether the applicant has a case to answer, I find that the case has progressed far enough and is near to completion. All in all, therefore, bail is denied. Leave to appeal against this ruling is granted.

I order accordingly.

Pronounced in Chambers in Lilongwe in the Republic this 9th day of June 2020.



Fiona A. Mwale

JUDGE