



REPUBLIC OF MALAWI

HOMICIDE BAIL APPLICATION NUMBER 130 OF 2020

BETWEEN:

NORMAN PAULOSI CHISALE.....APPLICANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: LADY JUSTICE IC KAMANGA

Gondwe	Applicants Counsel
Kayuni,	Chief State Advocate
Khonje	Court Clerk

RULING

THE APPLICATION

1. Norman Paulosi Chisale moved this court on 5th August 2020 seeking to be released from custody at Maula Prison. The application is made under section 42(2)(e) of the Constitution.

2. In the Applicant's sworn statements as well as that of his counsel, the Applicant states that he is a Malawian and works as the Director of Security Services for the former head of State Professor Arthur Peter Muntharika. He lives in an institutional house in Mangochi where the former head of State is now residing. He has his permanent residence in Area 3 in the City of Lilongwe. On 28th July 2020 the Applicant was arrested by members of the Malawi Police Service from the National Police Headquarters on allegation that he had committed the offence of murder. Thereafter, he was presented before the Chief Resident Magistrate in Lilongwe for committal proceedings at which he was informed that he was charged with causing the death of Issa Njaunju.

3. The Applicant states that the State have concluded their investigations by virtue of the fact that they have already taken a caution statement from him and charged him. And as statement under caution has been recorded, interests of justice requires that he be released from custody on bail as there is no reason for further incarceration.

4. It was indicated that the Applicant is answering other charges in the Chief Resident Magistrate Court in Criminal Case Number 737 of 2020 in which he was released on bail. He is also answering charges in Criminal Case No 134 of 2020 at the High Court Principal Registry in Blantyre at which he was granted bail. It was indicated that the fact that the Applicant is already on bail on the other matters shows that the Applicant is not a flight risk and will attend trial.

5. The Applicant continued to state that upon his release in the matter at the Principal Registry, he was rearrested by the State on 17th July 2020 and when he appeared before the Chief Resident Magistrate he was immediately released on bail. He was arrested again on 28th July 2020 and was granted bail by the High Court. The Applicant laments that the re-arrests of the Applicant by the State on different issues when the State is aware that the Applicant has been granted bail is an abuse of the State's police powers of arrest and investigations as a criminal matter can be commenced without first invoking an arrest on the suspect as long as the suspect/accused can attend trial.

6. The Applicant further notes that he ought not be in incarceration as there is an outbreak of COVID virus in the Republic and the government is encouraging people to practice social distancing and hygiene. He states that it will be in the interest of justice to release him on bail so that he can wait for his appearance in court whilst in a protected environment. It is therefore proper and in the interest of justice to release him on bail in accordance with the presumption of innocence and on similar conditions as those in Criminal Case No 134 of 2020.

THE RESPONSE

7. John Justice Jailosi, Senior Superintendent at National Police Headquarters filed a response to the bail application. In his sworn statement, he states that he is one of the main investigators in the matter and he was deposing on matters of fact that came to his knowledge during the investigations. He indicates that the Applicant was in custody on suspicion that he participated in the death of Issa Njaunju on around the 2nd July 2020. He is therefore on remand on a charge of murder. The facts on which the Applicant was arrested are premised on a conspiracy and plot believed to have

been hatched at State House in Lilongwe where the Applicant was working. The Police are still questioning the Applicant on the death of Issa Njaunju.

8. There are persons that the police are presently talking to in the ongoing investigations that were the Applicant's subordinates and associates during his employment at State House and are vouching to the operational mechanism of the Applicant. These persons are close associates and witnesses who are cooperating with investigators in the gathering of information. Previous investigations revealed that the witnesses had information on operations of personnel leading to the death of Mr Njaunju as having been instituted at State House with full supervision of the Applicant. Upon this State House connection discovery, the closeness of the Applicant to the former President as head of security and a further close relationship with the Police leadership at the time, made it impossible for the investigators to complete the investigations.

9. The Applicant is a very powerful person with military background, well-resourced financially and has an operational mechanism that would pose a danger to the witnesses. The Applicant has capacity and technology to interfere as indicated by the persons who are witnesses in the murder of Njaunju. Some of the witnesses who are crucial were scared and fled Malawi. These witnesses have been in touch with the Applicant and need to be secured before the Applicant is released on bail. The State will also be interviewing the former Head of State on the matter as well as a number of crucial personnel that served the former Head of State at State House on the operations and undertakings of the Applicant.

10. There is also technical information related to electronic gadgets that will form part of the evidence but the technicians are currently outside the country. The State needs at least ninety days to complete investigations and secure all witnesses under an advocacy protection mechanism. Hence the interests of justice require that the Applicant should not be released on bail.

THE LAW AND ANALYSIS.

11. Section 42(2)(e) of the Constitution states that every person arrested for, or accused of, the alleged commission of an offence has the right to be released from detention, with or without bail unless the interests of justice require otherwise. This however is not an absolute right. Every accused person is however by law presumed innocent until proven guilty. Courts are therefore ordinarily very slow at denying a person his right to bail. And the Malawi Supreme Court as well as the High Court have released persons suspected of murder from custody where it has been

demonstrated that the interest of justice so requires. The courts have also recognized in some instances that the interests of justice favours that a suspect should be in incarceration. The paramount consideration that a court takes into account as to whether or not the accused person's right should be curtailed or not is his availability to attend trial. So often cited is the *Rex v Hawken* [1944]2 DLR, where at 116,119-120 Chief Justice Fris observed that:

The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted when the judge is satisfied that bail will ensure the accused appearing for his trial.

The MSCA repeated this position in *Amon Zgambo* in 1998.

The Criminal Procedure and Evidence Code as well as the Bail (Guidelines) Act buttress the constitutional provision.

Section 118(3) of the CP&EC states that:

“The High Court may, either of its own motion or upon application, direct that any person be released on bail...”

12. Expounding the right to bail, the CP&EC acknowledges that there are times when pretrial incarceration may be sanctioned by law. The prescriptions are in PART 1VA of the CP&EC. Section 161A states that an accused person may be held in lawful custody in relation to an offense awaiting the commencement of his trial. The maximum period of pre trial incarceration where a person is charged with the offense of murder is ninety days¹. The Applicant herein has been in custody for a period less than ninety days hence the incarceration is presently legally sanctioned by law. This however is not the end of the story, for recognizing the sanctity of the right to liberty and the propensity for the State to abuse its police powers, the statute allows a detained person to move the courts to lift the statutory curtailment of his right to liberty even before the prescribed time period expires. And section 161J of the CP&EC indicates that:

“Nothing in this Part shall preclude an accused person in lawful custody from otherwise applying for bail under any other law during the subsistence of a custody time limit.”

¹ section 161G of Criminal Procedure and Evidence Code Cap 8:01

13. It should be mentioned at this point that in as long as the person that is seeking the release on bail is a mere suspect or accused person, the burden to show that it would not be in the interest of justice to release such a person lies with the State².

14. The Applicant in the matter at hand has cited various reasons for the court to exercise its discretion towards releasing him from custody despite the fact that the pre-trial custody time limit has not expired. He has indicated that he has a permanent place of abode in Malawi. He has a family that needs him. He has no intention to leave the jurisdiction. The Maula prison where he is incarcerated is so congested that the likelihood of his contracting the CORONA VIRUS are very high. Most important of all he is presumed innocent by law.

15. The State has mostly leaned towards the fact that investigations are ongoing as the basis for requiring that the Applicant should continue to be in custody until the ninety days lapse.

The State has also referred to the Applicant's military background, his financial muscle, the nature of the witnesses that the State is interrogating that some of them were intimidated by the Applicant to the extent that they fled the country; that some witnesses are the Applicant's own associates while others were his subordinates at State House of whom he has their contacts. The fact that there is technology involved which require evidence outside the jurisdiction and the fact that the ninety days have not lapsed have been advanced as a reason for denying the Applicant his right to be released on bail.

16. In reply, the Applicant's Counsel has submitted that the fact that investigations are still ongoing on the part of the State should not be the basis for denying the Applicant his right to bail. The MSCA determination in the *Kettie Kamwangala vs The Republic*³ has been referred. The Supreme Court observed that [whenever there is] fear that an accused person would interfere with investigations and/or witnesses the court can tailor conditions in such a way as to make sure that the accused person does not do that. Or the conditions should be such that if the accused person interferes with investigations/witnesses, the court would be in a position to know. This can be done by putting conditions that would bar the accused person from getting in touch with witnesses potential or actual or from the investigative process itself.

² Fadweck Mvahe vs Republic MSCA Appeal No 25 of 2005.

³ Kettie Kamwangala vs The Republic (MSCA Misc. App No 6 of 2013).

17. In the *Kamwangala* case the court commented on incomplete investigations. The Hon Justice Chikopa SC observed:

Much was said about incomplete investigations. Whether they can be the basis for denial of bail. Speaking for ourselves we believe that law enforcement should only effect an arrest when they have evidence of more than mere suspicion of criminality. We also believe that such evidence should only be the product of investigations. Where there is no investigation there cannot, we believe, be any evidence. We therefore find it rather perverse that law enforcement should arrest with a view to investigate. Or that they should object to release on bail merely because they have not completed investigations. It calls into question the very acts of arresting and detaining a person. It also raises the question whether or not law enforcement will benefit from their own incompetence. Accordingly, in our view the courts should be slow, very slow to refuse to release a detainee just because law enforcement has not completed investigations. Proceeding otherwise would lead to abuse of the right to liberty. People would be detained or continue to be in detention on the basis of pending or incomplete investigations when there were in fact none. Law enforcement would be tempted to slow down investigations with a view to keeping accused persons in custody longer. We would therefore rather the law were interpreted in such a way that arrests and detention followed investigations. That way liberty would, in appropriate cases, then be withheld not because investigations were not complete but because they would not be properly completed with the accused at liberty. Or that there would be interference with witnesses/investigations,. In not permitting the immediate release ... in the absence of evidence of possible interference with investigations/witnesses in order to allow the police to complete investigations the High Court in our judgement ... erred.”

18. This determination on investigations has to be scrutinized and contextualized. The MSCA in this judgement condemns and rightly so using investigations as a basis for detaining or continuing with the detention of an accused person. As noted if this was allowed, it would dilute the very essence of the fundamental right to liberty. If allowed, it would defeat the intended purpose which was that the State is being dissuaded from using the State machinery to blatantly and without cause abuse citizen’s right to liberty under the pretext of investigations.

19. In my reading of the determination, my observation is that the MSCA does not totally discard investigations as a basis for continued detention of an accused. The MSCA notes that there are instances where investigations may be a basis for curtailing an accused person’s right to liberty. This is at instances where investigations are not complete because investigations

cannot be properly completed with the accused person at liberty. The MSCA also notes that the right to bail would be curtailed if there would be interference with witnesses/investigations. The MSCA further states that at such occasions, the State must provide evidence of possible interference.

20. In the matter at hand, the State, through the sworn statement of one of the main investigators John Justice Jailosi has stated that the Applicant is a man that has a military background whose financial status is such that he can interfere with witnesses. The State has also indicated that in fact some witnesses left the jurisdiction in apprehension. And because of this apprehension the State would want to come up with an ad hoc witness protection arrangement before the Applicant is released from custody. This appears to this court to be a reasonable basis for seeking that the Applicant should continue to be in custody.

In *Amon Zgambo v Rep*, the MSCA noted that:

The requirements of bail are merely to secure the attendant of the accused at his trial and the test is whether it is probable that the accused will appear to take his trial. The determination of this issue involves a consideration of other issues such as the seriousness of the offence, the severity of the punishment in the event of a conviction, and whether the accused has a permanent place within the jurisdiction where he can be located.

The court will take into account this issue of whether there are reasonable grounds for believing that the accused if released on bail will tamper with witnesses or interfere with the relevant evidence or otherwise obstruct the course of justice. The determination of this issue will involve a consideration of the other related issues such as whether the accused is aware of the identity of the witnesses and the nature of their evidence, whether the case is still under investigation, whether it is probable that they may be influenced or intimidated by him. The court will also consider whether there is reasonable likelihood that if released on bail, the accused will commit further offences .”

21. Where there is likelihood of witnesses and evidence being obtained outside the jurisdiction, the court may not exercise its discretion in favor of releasing an applicant on bail. The State has stated that it will involve witnesses outside the jurisdiction because of the nature of the evidence/ technology that would form part of the evidence. In *Jahid Osman Ibrahim v The Republic*⁴ the High Court did not release the Applicant on bail where investigations had spilled over to neighboring countries. It was observed that it would be unfair to expect

⁴ *Jahid Osman Ibrahim v The Republic* [Misc. Criminal Application No 20 of 2008]

that such investigations would be concluded within a period of less than a month.

22. With regard to the pandemic of the CORONA VIRUS, this cannot form a basis for seeking that the Applicant be released from lawful custody. If at all this were to be entertained, all persons in custody would be legible to be released on account of the Covid 19 pandemic regardless of their criminality. The Bail (Guidelines) provides that in applying the principles pertaining to releasing a suspect on bail, the state of health of the Applicant, as certified by a medical practitioner must be taken into account. The court herein has not been furnished with a report from a medical practitioner that the Applicant herein has a health risk and is likely to be so infected.

23. When everything is considered in the matter at hand, interests of justice weighs against release of the Applicant on bail. This is as against the sworn statement of the John Justice Jailosi aforementioned that the Applicant is a man of influence, with associations and there is technology in issue. In those circumstances this court is wary and convinced that conditions that would curtail interfering with witnesses and tampering with evidence would be an exercise in futility. The application is dismissed.

Declared in Open Court sitting as a Chamber this 28th Day of August 2020.

Lady Justice IC Kamanga.

JUDGE