



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
MISCELLANEOUS CRIMINAL CAUSE NO. 47 OF 2021
JUSTIN PANGANI
VS.
THE REPUBLIC

CORAM:

HONOURABLE JUSTICE MZONDE MVULA;

Mr. Z. Ndeketa, Of Counsel for the applicant;

Mr. A. Mphepo, State Advocate, for the Republic

Mr. A. Nkhwazi, Court Clerk and Official Interpreter.

RULING

(Following an application made under Section 42(2) (e) of the Constitution of Malawi)

Mvula, J.

- 1.0. This is an application by the accused person (hereinafter called "the applicant") for an order that he should be released on bail. The application has with it, sworn statement in support, deposed by Counsel Mr. Zaheed Ndeketa. He submits that the 40 year old applicant hails from Godfrey Village, T.A. Mwambo in Zomba District and is currently remanded in Zomba Maximum prison awaiting trial.
- 2.0. Counsel states that the applicant was arrested on allegation of a murder charge, emanating from death of the late Mr. Mayeso Byson. He was brought before the Zomba Magistrate's Court where he was formally charged with murder. In October 2010, he was released on bail only to be arrested on 17th February 2016 because he availed himself late at trial, which was deemed breach of bail

conditions. On 27th September 2017, he was released on bail, and he was told the matter will come for trial on 27th October 2017 before Justice Kwamwambe. In the meantime, he adhered to the bail conditions until he secured a job at KK Security Services, tenable in Nkhota Kota. Trial date was subsequently set down for 17th October 2018. Due to work schedule, he did not avail himself at trial. He was arrested for it, on 17th November 2018. The applicant has remained in custody ever since. The case has not been set down for trial, despite securing that which held back trial. The applicant states he cannot evade trial, because he is settled. He undertakes to be available at trial and attend to any condition the court may set down. This is because he has been remanded for 2 years 6 months by the time of this application. The case has not moved. Against these backgrounds, the interests of justice and scales of justice tilt in favour of the applicant, to be released on bail because of the presumption of innocence.

0. The Republic through the State Advocate Adson Mphepo, deponed a statement in opposition to the application. In short, they object to this bail application, because the applicant is a flight risk and he has uncooperated with the state machinery in the conduct of the matter. Paragraph 5 in opposition to the application states that the applicant was arrested when he went to report to Police if he is wanted for the trial. He was granted bail and he was later rearrested because he was not available at trial on 27th October 2017. The court is ever ready to hear the case and the applicant does not cooperate for trial.

0. The Legal position

1. Bail are sureties taken by a person, duly authorised, for the appearance of an accused at a certain date and place and be justified by law. In **Suleman v Republic 16 MLR 793** the likelihood to appear at trial is paramount consideration for bail. There is no doubt in my mind that any accused has a right under Section 42(2) (e) of the Constitution of the Republic of Malawi to be released from custody with or without bail. In short, an accused must ordinarily be released on bail, unless the interests of justice requires otherwise. It is law that the right to bail, can be limited under section 44(2) of the Constitution.

- 4.2. It is also trite law that the burden of demonstrating that it would not be in the interests of justice for an accused person to be granted bail rests on the Republic. This is done through reasons in support of the assertion. See **Fadweck Mvahe v The Republic MSCA Criminal Appeal No. 25 of 2005** (unreported). The State is required to prove this on a preponderance of probabilities. See **Phiri and another v The Republic [2000-2001] MLR 369**. The test is, whether it is probable that the accused will appear at trial. If yes, bail is readily granted. On the other hand, if not probable, bail is denied.
- 4.3. Section 4 of Part II of the Bail (Guidelines) Act sets out some of the principles which the court should take into account in deciding whether or not bail should be granted which include:
- (a) Likelihood that the accused, if released on bail, will attempt to evade his or her trial;
 - (b) Likelihood that the accused, if released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence;
 - (c) Likelihood that the accused, if he or she were released on bail, will endanger the safety of community or any particular person or will commit an offence; and
 - (d) Likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

5.0. Discussion of subject of interests of justice and finding by the Court

- 5.1. The onus rests on the Republic to show cause to court, that, it is not in the interests of justice that the applicant should be granted bail. The Republic has expressed militating factors against release from detention. That, the applicant is a flight risk, and that he has not cooperated with authorities to attend to trial. The interests of justice therefore will be preserved in this matter by remanding the applicant in custody. Interests of justice, is a term with a wide ambit. In part, it includes that any person arrested for alleged commission of an offence, should stand and conclude their cases. If they jump bail, it puts the whole trial

procedure in jeopardy. Further, it encapsulates that those accused who are more likely to jump bail, should remain in custody until the duration of the trial. In determining an application for bail, it involves balancing two interests. One, the right of the accused to be released from detention and remanded on bail. The second, from the view point of the Republic, that all cases commenced against accused, should conclude logically because accused is present at trial. Remand in custody, ensures that the cases are concluded because all factors being equal, trial will take place without failure of an accused to attend to it.

5.2. In this regard, the views expressed by the Republic, the party on whom onus rests a burden to show cause why the applicant should not be released on bail, should be examined. I have regard to the 2 year 6 month period, the applicant has been remanded in custody following revocation of bail. The state has not moved an inch, to prosecute the applicant. The trial has stagnated, with applicant in custody just as it did whilst he was on bail. The applicant continues to enjoy presumption of innocence under section 42(2) (f) (iii) of the Constitution. He did not attend to trial because he was at work in Nkhotakota within the Republic. He has a right to right to development under section 30, and the right to employment under section 31 of the Constitution. Despite facing criminal prosecution, he has to take care of his family by among other considerations, seeking employment. The Republic has not substantiated, how he is a flight risk. Further, how he did not cooperate owing from the time line he was given notice, and what he did to defy it. Notice to attend trial, has to be reasonable.

5.3. The Republic is guilty of inordinate delay to prosecute the applicant. They have not taken tangible steps to prosecute him from the 17th November 2017. Each time the applicant is called, he has been available. He reports for bail. He had his bail revoked. This is a case the Republic must take more bold steps to see that case is concluded. It is difficult to appreciate how the interests of justice will suffer, if he is released on bail. The presumption of innocence suffers, however, by remanding the 40 year old in custody. He still has to serve and attend to his family, indeed, those who rely on him. The revocation is heavy

handed. No hearing following the revocation, has been held, to show cause why bail should not be revoked in the circumstances. There has been a sanction without due process in the revocation for bail, for 2 years 6 months now. Immediately after revocation of bail, the Republic should have appeared in court to address it, for benefit of this applicant, as to why the present is the *status quo*, and hear him on record, to delay to come to trial.

5.4 The interests of justice will not suffer if the applicant is released on bail yet again. The Court shall call for a conference within 14 days, where time lines shall set down. The accused should be foretold at least 30 days, of dates of trial so he prepares to travel to Court. At this conference, the accused, should be explained to, carefully on all the steps of the trial procedure. Against the foregoing, the Court shall grant bail on fresh terms to the applicants as follows:

1. The applicant should enter into a cash bond with Government of Malawi valued at K60,000 (an additional K30,000 to that on GR # 0468866);
2. The applicant should produce two reliable sureties to be examined who:
 - a. Should have a valid Nzika card issued by the Republic; and
 - b. Each surety should be bonded to K250,000 non cash bond;
3. The applicant should be reporting at Zomba Police Station fortnightly on Fridays at 9.00am until trial is concluded;
4. The applicant should make copy of his National Identity card and deliver at Zomba Police;
5. The examination of sureties shall be done by the Assistant Registrar for Zomba District Registry on a day and time the parties will agree but not later than 22nd July 2021. The initial bail conditions are set aside. The current shall be applicable until a further order of this court.

Made in Court this 14th July 2021



JUDGE.