REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

MISCELLANEOUS CRIMINAL CAUSE NO. 55 OF 2021

FRANSISCO ALBERTO NALELO

VS.

THE REPUBLIC

CORAM: HONOURABLE JUSTICE MZONDE MVULA;

Mr. J. Lihoma, of Counsel for the applicant;

Mr. R. Mkweza, State Advocate, for the Republic

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

RULING ON APPLICATION FOR BAIL BEFORE TRIAL

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

Mvula, J.

1.0 **Introduction**

1.1 This is an application by the accused person (hereinafter called "the applicant") for an order to be released on bail. It has with it, a sworn statement in support, deponed by Counsel Mr Joseph Lihoma, dated 21st June 2021. This is because the 29 year old Mozambican applicant, and a resident of Muhere Village, Mukherere Centre, Traditional Authority Mpeni in Mozambique, remains remanded in custody at Mulanje Prison, here in Malawi.

1.2 Counsel states that the applicant was arrested on allegation of a murder charge, emanating from deaths of Falesi Komiha aged 75 and Zione Makwira aged 14 from Kholoviko village, in Phalombe District, who met the applicant in

Mozambique. Because of the interaction, the applicant and co accused were traced as the ones who caused the death of the deceased. He was arrested in Mozambique around November 2018, by Malawi Police through the help of Mozambican Police and brought to Phalombe Magistrate Court for committal to the High Court. His trial is yet to take place. Most critically, the applicant has over stayed in Prison beyond the Pre-Trial custody time limits under Section 161 of the Criminal Procedure and Evidence Code.

1.3 Despite the applicant being a Mozambican where he is resident, the applicant has origins and relatives in Malawi. If granted bail, he is ready to stay with his uncle Mr Patrick Masumba, of Limbuli Trading Centre, Mulanje, until the conclusion of trial. He has reliable and traceable sureties who are ready to stay with him until trial is concluded. Furthermore, buoyed by the Constitutional right of presumption of innocence, he undertakes to be available at trial and will comply with conditions the court will impose. Against these backgrounds, the interests of justice tilt in favour of the applicant, who must be released on bail with a bond which he is prepared to execute counsel argues.

1.4 The Republic through the State Advocate Gift Msume, deponed a statement in response to the application. In short, they object to this bail application, because the applicant is a flight risk. After the commission of the offence on 22nd October 2018 in Phalombe, the applicant fled to Mozambique, from where he was arrested by the Malawian authorities. Granting him bail would accordingly jeopardise trial, a militating factor against granting of bail. Investigations in this matter are over, and the case is now ready for trial.

2.0 **The law on bail**

2.1 Bail is defined as 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. It was stated in **Selemani v Republic 16(2) MLR 793** the likelihood to appear at trial is paramount consideration for bail. There is no doubt in my mind that all the applicant as accused person as we speak has a constitutional right under

Section 42(2)(e) of the Constitution of the Republic of Malawi to be released from custody with or without bail, regardless of his domicile status.

2.2 In short the accused must ordinarily be released on bail, unless the interests of justice require otherwise. It is also trite law that the right to bail, which is stipulated in Section 42(2) (e) of the Constitution, is not an absolute right. Bail must be granted subject to the interests of justice which becomes a reasonable limitation under section 44(2) of the Constitution to the right o bail.

2.3 It is also trite law that the burden of demonstrating how prejudicial it is to the interests of justice that an accused person must not be granted bail rests on the State. It must give reasons in support of this assertion. This was propounded in the case of **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 than not, for the accused will appear to take his or her trial. See **Rep v Allen 4ALR Mal 549.**

2.4 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. These 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.

3.0. Application of the law to the facts to determine this application

3.1 The onus rests on the Republic to show cause to Court, that, it is not in the interests of justice that the applicant be granted bail. The Republic has expressed one militating factor against release of the applicant from detention. The fact that the applicant is a high fight risk. This emanates from the revelation that the he fled from Malawi to his safe base of Mozambique, where he is ordinarily domiciled.

3.2 The applicant on the other hand argues that he did not flee. He simply returned to his domicile. Most critically however, is the revelation that the Republic has violated pre-trial custody time limits, and a violation of the dignity of the applicant. The applicant quotes page 2 from the case of **Sandras Frackson and Others v The Republic MSCA Criminal Appeal No 1 of 2018 (Unreported).** It went;

> *"As depicted by section 18 of the Constitution. Personal liberty is a high profile right under the constitutional dispensation that exists in this jurisdiction. Thus whenever it is revoked, even by the State by alleged crime, the inclination of the law is that the circumstances surrounding such revocation be looked into at the earliest opportunity with eye towards the possible restoration the said liberty..."*

3.3 Where the personal dignity has been violated, it must be within the confines of the law. This is because section 161 of the Criminal Procedure and Evidence Code provides the maximum time lies a person may have own liberty stripped. Page 3 of the Supreme Court decision in point, also touched on this point in relation to the case like the present. The Court said:

> *"...for the offence of murder, which falls within the category of the most serious crimes in our land, Section 161G of that part of the Code sets a maximum of 90 days as the longest lawful incarceration a person accused of that level of crime can undergo before the commencement of his trial...Section 161I of this Code comes in to empower Courts, even of their own motion,* ***to consider releasing whoever is affected at the expiry of the lawfully pre-trial custody limits***" [Emphasis supplied]

3.4 From the foregoing, it is clear that the pre-trial custody limits must strictly be adhered to. If the Republic does not lawfully subject an accused to pre-trial custody time limits, the court on its own motion, may exercise of its discretion, and consider to release the affected. It does not give the court absolute power to release the affected without considerations of the prescriptions of law. The court may consider releasing the accused on such terms it may deem fit. Due process therefore, has to be followed, according to law. After all, the release will be under section 42(2) (e) of the Constitution. To wit, it could be with or without bail.

3.5 The right to bail, is available to the applicant, subject to the interests of justice. The latter as a legal concept is packed. It has many faces, with so many considerations as elucidated under part 2 above. The concept is a jurisprudential term with a wide ambit. In part, it includes that all accused who are arrested for alleged commission of an offence, should stand trial fully. If they jump bail, it puts the whole trial procedure in jeopardy. The Court grants bail to those accused, it believes will not abscond.

3.6 The paramount consideration to grant bail, is availability at trial. The Court will be irresponsible and in breach of its constitutional duty to discharge its mandate by not carefully balancing right to bail against availability at trial. Release on bail for an applicant with questionable credentials to be present at trial, is a release without the interests of justice. The court would lose the trust, confidence and respect of the people it is mandated to serve. After all, interests of justice wish to see that justice is served to the deceased death of which applicant will be tried. If he is not available at trial, because of his romantic release from detention for á violation of pre-trial custody limits alone, without consideration of how the interests of justice stand to suffer, injustice will be served in this matter.

3.7 The applicant is domiciled in Mozambique with a family. He has an uncle at Limbuli trading, in Mulanje with whom he is ready to stay, until the duration of this trial. The applicant therefore moves the court guarantee his availability at trial, as a paramount consideration under section 42(2) (e) of the Constitution.

On the other hand however, the applicant is capable to travel out of Malawi into Mozambique, without documentation. If allowed out on bail on this premise, he has the same chances to be present at trial, just as he would be absent from it. See **Selemani v Republic (*supra*).**

3.8 The legal standard to release from detention an applicant on bail, is on a balance of probability. The applicant could be present, just as he could be absent at trial. There are porous borders and the family ties he enjoys on either side of the international divide would absorb him conveniently to evade trial. The interests of justice therefore cannot be preserved in such a matter, in as far as this applicant is concerned. This has to be balanced with the present violation of pre-trial custody time limits under section 161F of the Criminal Procedure and Evidence Code. The release for this violation has to be balanced on the scales of justice, with the demands of the interests of justice, on the other end.

3.9 The interests of justice encapsulates that those accused to have committed an offence, and who are more likely than not to jump bail, should remain in custody until the duration of the trial. The court must engage a balancing act. On one hand, the right of the accused to be released from detention and be remanded on bail. The second, and from the view point of the Republic, all cases commenced against accused conclude logically because accused were ever present to stand trial. That is why courts conduct camp courts even in prisons to access remanded thereby according them greater access to justice.

3.10 It was submitted that during camp court at Mulanje prison on 7th July 2020, the applicant applied for bail. The High Court denied the application made there. There is no need for the Republic to produce a record of the camp court proceedings at prison as argued by counsel for the applicant. Courts time and again go to prison during visits to hear such applications. Courts give reasons for the denial to release the applicant from incarceration. It is judicial act. The denial was only safeguarding the applicant to remain present at trial. Much as the applicant has been remanded for 2 years and 9 months, there is a way to get round it. The court could order expedited trial. Moreover, the remand period

will always count, should the verdict go against the applicant. See **Mphinza Kuchande v Republic Sentence rehearing case 12 of 2018 Zomba District Registry (Unreported)**. Time spent in custody from arrest in a homicide, formed part of sentence of the convict leading to his immediate release.

3.11 In this regard, the legal position above expressed by the Republic, the party on which bears the burden to justify why the applicant should not be released on bail, vehemently objects to this application. Accordingly, bail should ordinarily not be granted in those circumstances. See **Fadweck Mvahe v Republic (*supra*)**. What is more, the interests of justice will indubitably suffer if the applicant were released on bail, not to be available at trial. This is because he is a person of means capable, of not only leaving Malawi, but, can travel without valid travel documentation, or none at all, between Malawi and Mozambique.

4.0 **Conclusion**

4.1 Interests of justice in this matter must be secured. With the peculiar attributes in the domicile status of the applicant, the nature of our boarders, and the case generally, the Court considers otherwise. This is a case where the availability of the applicant must be properly secured, notwithstanding presumption of innocence. This is by remand in custody for the time being until fundamental change of domicile status of the applicant. Bail is therefore denied for he is a flight risk. Applicant should remain remanded in custody at (Mulanje) Prison.

4.2 The court orders expedited trial in this matter. The trial should commence within 30 days next, failure of which the court may reconvene and reconsider the present ruling, *in meri motu,* to release the applicant with interests of justice.

Made in Court this 13th July 2021

JUDGE.