REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 13 OF 2021

BETWEEN

WELOS KAMPHULU ..... APPLICANT

AND

THE REPUBLIC ..... RESPONDENT

Coram: *Honourable Justice Violet Palikena-Chipao*
Twea, of Counsel for the Applicant
Salamba, Senior State Advocate, of Counsel for the Respondent
Nyirenda (Ms), Official Interpreter and Court Clerk

RULING ON APPLICATION FOR BAIL PENDING TRIAL

The Applicant, Welos Kamphulu has filed an application for bail pending trial. The application is made pursuant to sections 42(2) (e) of the Constitution; 118(3) and 161G of the Criminal Procedure and Evidence Code. The application is opposed by the State.

The background of the application is that the Applicant was arrested on 19th November 2020 on allegations that he had caused the death of Biston Kadembo around May, 2019. The Affidavit in support of the application filed by Counsel for the Applicant states the circumstances that resulted in the death of the deceased and on those circumstances, it has been argued by Counsel for the Applicant that the circumstances do not amount to murder. It has also been argued on behalf of the Applicant that the Applicant does not have any travel document and that as such he cannot jump bail if granted; that he has no criminal record and that as such there is no risk of committing further crimes; and that he does not know anything about the police investigations and that as such he cannot tamper with evidence. It was therefore submitted on behalf of the Applicant that it is in the interest of justice that he be granted bail.

In response, the State also explained the circumstances in which the offence was committed, submitted that bail should not be granted arguing that the Applicant is a flight risk. It was argued that the Applicant allegedly committed the offence in May, 2019 and run away and was arrested in November 2020 over a year after his return to Ntcheu.

In the skeleton arguments, Counsel for the Applicant in passing made reference to the issue of pre-trial custody time limits. On Page 3 of the skeleton arguments under the subtitle '*Pre-trial Custody Time Limits*' all that the Applicant through Counsel has done is to recite parts of the judgment from pages 3-6 in piecemeal from the case of ***Sandras Frackson v Republic MSCA Criminal Appeal No. 1/2018.*** Nothing has been said as to the selected quotations from judgment. On page 5 of the skeleton arguments where the arguments for the application are articulated, the only statement that relate to pre-trial custody time limit is paragraph 14 which simply state's that the applicant has been detained for over three months and that this detention is illegal. The Applicant however did not in any way suggests that in view of the illegality then he should be released on bail as a matter of course. It is clear from the arguments on behalf of the Applicant in whole that the issue which he puts for court's determination is whether it is in the interest of justice that bail should be granted to the applicant. From the summary, Counsel for the applicant went on to put emphasis on the issue of interest of justice and submitted that there is nothing in the interest of justice against the granting of bail. It would therefore be concluded by the court that the issue of illegal detention has to be considered in the light of its implications on the interest of justice.

The state acknowledged that there has been a breach of pre-trial custody time limits with regard to processing committal to the High Court for trial but argued on the basis of the case of ***Taipi v. Republic*** MSCA ***Criminal Appeal No. 9/2014*** that even where there is breach, the court should still consider the interest of justice in deciding whether or not to grant bail. The state's argument is that in the present case in view of the circumstances of the commission of the offence, that the applicant is a flight risk and that investigations are over and that the case docket is ready for trial, it is in the interest of justice that bail be denied.

I will start by dealing with the issue of pre-trial custody time limit before as it has a bearing on whether or not it is necessary to deal with the application for bail by the Applicant. Pre-trial custody time limits are provided for in Part IVA of the CP & EC (i.e sections 161A-J). Section 161G of the CP & EC is the one applicable to serious offences like the one at hand. The section provides 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.*

The accused having been arrested in November 2020 has been in custody for over 90 days which means that there has been a breach of the pre-trial custody time limits as indicated by the Applicant through Counsel.

In the case of ***Mavuto Taipi v Republic*** MSCA ***Criminal Appeal No. 9/2014***, the Malawi Supreme Court of Appeal dealt with the question of whether the provisions on pre-trial custody time limits overtake the requirements of interest of justice stipulated in section 42(2)(e) of the Constitution in deciding whether or not to grant bail. The MSCA took the view that the pre-trial custody time limit provisions did not create a new regime on basic requirements for bail and that the discretion that the court has under section 42(2) (e) of the Constitution when faced with the question of bail for any accused person does not stop at the expiry of pre-trial custody time limit. The court stated and I quote;

> *We are, we must say, convinced that in setting pre-trial custody time limits Sections 161 G and I of the C.P. & E.C. were not meant to dislodge, or to otherwise overtake, the Constitution on its basic requirements for considerations of bail. Rather, we believe they were meant to aid the Constitution by empowering the Courts to, even on their own motion, step in and consider bail when they see the time limits not respected. We accordingly reject the argument of the Appellant to the effect that these provisions have since set up a new regime of viewing pre-trial bail in all cases where pre-trial custody time limits have been exceeded. While we are aware that in most cases where the State has held a crime suspect for a longer period of time than the prescribed pre-trial custody time limit Courts will almost inevitably conclude that it is contrary to the interests of justice to prolong such incarceration, this to us does not necessarily mean that in every such case Courts cannot choose whatever they consider to be the most just way of determining a bail application that comes before them... In our judgment, a consideration of the interests of justice remains of vital importance whenever a Court is considering a pre-trial bail application, whether such application for bail is initiated before, or it is initiated on or after, the expiry of the applicable pre-trial custody time limit.*

The court went further to state as follows;

> *"In our Judgment, a consideration of the interests of justice remains of vital importance whenever a Court is considering a pre-trial bail application, whether such application for bail is initiated before, or it is initiated on or after, the expiry of the applicable pre-trial custody time limit."*

The MSCA whilst acknowledging that the court will inevitably conclude that it is contrary to the interest of justice to prolong incarceration where pre-trial custody time limit has been exceeded, this does not mean that in every such case court cannot choose to exercise their discretion in deciding what is the just way of determining a bail application. This means that it is possible to deny bail even where pre-trial custody time limits have been exceeded as long as the interests of justice so demands suffice to say that in case of prolonged detention, the court may conclude that further detention my not be in the interest of jstice. Thus, in the ***Mavuto Taipi Case*** bail was denied on the account that the Applicant had already demonstrated that he could not be trusted as he

escaped from lawful custody and was able to hide for 7 years. The Court has also considered the case of ***Sandras Frackson v Republic MSCA Criminal Appeal No. 1/2018*** where the MSCA granted bail to accused persons whose pre-trial custody time limit had expired. In that case the accused persons who included a child had stayed in custody for close to two years and though they had been committed to the High Court for trial, the state had done nothing to ensure that the accused were accorded a fair trial. The granting of bail in that case in our view did not depart from the principle enunciated in the case of ***Mavuto Taipi Case.*** In our view the case demonstrates that the lengthy of the period taken after the expiry of the pre-trial custody time limit may weigh in favour of granting of bail the interest of justice for it is not in the interest of justice to continue holding an accused in custody for longer periods without even prospects of trial beyond the prescribed pre-trial custody time limits. This court will therefore proceed on the premise that although the pre-trial custody time limit has been exceeded in respect of the Applicant, the court has a duty to determine whether his release on bail is in the interest of justice.

The right to bail is guaranteed by section 42(2) (e) of the Constitution is subject to the interests of justice. Interest of justice has not been defined in the Constitution but the Bail Guidelines Act of 2000 offers guidance on what to consider when deciding whether or not it is in the interest of justice to grant bail. The Bail Guidelines Act in Section 3 under Part II on Bail by the Court Paragraph 4(a) to (d), lays down principles which the court should take into when deciding whether or not to grant bail.

(a) the likelihood that the accused, if released on bail, will attempt to evade his or her trial
(b) the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence
(c) the likelihood that the accused, if he or she were released on bail, will endanger the safety of the community or any particular person or will commit an offence
(d) in exceptional circumstances, the likelihood that the release of the accused will disturb the public order or undermine the public peace or security

In the present case, the only principle in issue is that of the accused's likelihood to attend trial. The other principles are not really in issue investigations having been concluded as indicated by the State and there being no evidence or suggestion that the Applicant may endanger the community if released on bail. In his response the Applicant alluded to the fact that he run away because he was afraid of retaliation from relations of the deceased but there is no suggestion that when he returned to the village there were any threats of disturbance public order or public peace. So what remains in issue is whether in the circumstances there is a risk that if released on bail the Applicant will attempt to evade his trial.

Just as the Applicant, the state also narrated the circumstances of the commission of the offence. The circumstances of the offence as presented by both parties are similar save for one or two

differences. They both agree that the Applicant has two wives (Chifundo and Janet); that he visited Chifundo and later the same night left for Janet's house; that at Janet's house he found a man; that the man was stabbed by the Applicant and the man later died due to internal bleeding and severe loss of blood resulting from the assault. The point of departure between the two is that according to the Applicant's story the man runout of his house and as his wife was shouting for help, he run after him and they fought; and that in the course of fighting the man produced a knife and the Applicant managed to take the wife from him and stabbed him with his own knife. Thus it was argued on behalf of the Applicant that the circumstances of the case do not amount to murder. The state's version on the other hand is that the Applicant found the deceased sleeping with his wife and stabbed him and fled. Whatever the version of the story, it is a fact that the detention of the Applicant is on the basis of the death of the deceased which was a result of the assault inflicted on him by the Applicant. Whether the Applicant committed murder as the State argues or some lesser serious offence as the Applicant argues, the question is whether it is in the interest of justice that bail be granted bearing in mind that even in the most heinous of offences bail has been granted; and that the Applicant has already been in custody beyond pre-trial custody time limits.

The State's view is that the Applicant is a flight risk because he was on the run after the alleged commission of the offence for over a year. The Applicant acknowledges in his affidavit in support of the bail application that after the death of the deceased, he left Ntcheu for Blantyre but he said he did so because he was afraid of retaliation from relation of the deceased. He however did indicate as to when he returned to Ntcheu but it was just indicated in the Affidavit that he stayed in Blantyre for 6 months. Thereafter it is not clear from the applicant as to where he stayed prior to his arrest in November 2020. In paragraph 8.8 of the affidavit in support of the application, it is simply stated that the Applicant returned to Ntcheu until 19th November 2020 when he was arrested but the affidavit does not state as to when he returned to Ntcheu. The state on the other hand in its Affidavit stated under paragraph 5.6 that the Applicant returned to Ntcheu in November 2020 and was thereafter arrested. In the absence of express indications from the Applicant as to when he returned to Ntcheu, the court will conclude that he returned to Ntcheu in November 2020 on the basis of the state affidavit. From the time the offence was allegedly committed to the time he was arrested almost 18 months had elapsed. There is no suggestion that the Applicant took up the initiative to present himself before the police in Blantyre where he escaped to or that indeed upon return in Ntcheu he presented himself to police to show that the reason for his leaving Ntcheu was for his safety. In the absence of such indications and with the nature of the offence and the circumstances of its commission, it is the court's view that the State is entitled as it has done to conclude that the Applicant is a flight risk. It would thus not be in the interest of justice to release him on bail. The application for bail is therefore dismissed. The Applicant is at liberty to appeal against the denial of bail.

The court observing that the pre-trial custody time limit has expired and that the State has indicated that the investigations are over and the docket is ready for trial, orders that the State should within 30 days bring the accused before the court for plea and directions.

Pronounced in Chambers this **25th** Day of **March, 2021**.

Violet Palikena-Chipao

JUDGE