REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

FINANCIAL CRIMES DIVISION

CRIMINAL CASE NO. 10 OF 2023

BETWEEN

REPUBLIC

VS

RT. HON. DR. SAULOS KLAUS CHILIMA

CORAM: HONOURABLE JUSTICE R.E. KAPINDU

Messrs Khunga, Chiwala, Saidi, Likwanya, Counsel for the State

Messrs Kaphale, SC, Soko & Theu, Counsel for the Defendant

Court Reporter: V. Mombera

Clerks: F. Dzikanyanga & C. Saukila

RULING

KAPINDU, J

1. The Vice President of the Republic of Malawi, Dr. Saulos Klaus Chilima, the Accused Person herein, is facing criminal charges before this Court. The charges are being preferred against him by the Anti-Corruption Bureau (ACB), a Government Department established under section 4 of the Corrupt Practices Act (CPA) (Cap. 7: 04 of the Laws of Malawi), one of whose functions under section 10 of the said Act is to prosecute any offence under the Act.

2. The Accused Person was arrested on 25th November, 2022 on various allegations of corrupt practices, and was released on bail on the same day by the Chief Resident Magistrate's Court (sitting at Lilongwe). Dissatisfied with some of the conditions that the said Court imposed on him when he was being released from detention, he has applied for variation of the same before this Court. He premises his application on section 118(3) of the Criminal procedure and Evidence Code (CP & EC) as read with section 42(2)(e) of the Constitution of the Republic of Malawi (the Constitution).

3. This is the Court's Ruling on that application.

4. Dr. Chilima has raised a number of grounds in support of his application for the variation of his bail conditions.

5. He states that following his arrest, he was released on conditions which required, amongst other things, that he reports to the ACB offices once every three months and further that he surrenders his Passport to the Court. He states that he has complied with these conditions but now seeks that they be removed.

6. He argues, firstly, that given the high office which he holds, reporting at the offices of the ACB serves no practical purpose considering that the reporting requirement is meant to assure the prosecuting authorities of his availability for trial before the Court. He states that as the Vice President of the Republic, his schedule is well publicised and most of his movements are a matter of public record. At any given point in time, therefore, he states, almost every Malawian, including officers of the ACB will know where he is.

7. He proceeds to state that in respect of the condition that requires him to surrender his Passport, it is Government protocol that no senior Government official leaves the jurisdiction without taking leave of the State President, who ultimately has got overall superintendence over all of the Republic's security agencies. He states that such leave of the President will typically detail the destination and the duration of the visit.

8. Furthermore, he states that any external visit that he makes, whether it be of a private or official nature, is coordinated and planned by the Government. As such, he argues, it is not practical, nor is the fear reasonable, that he would flee the jurisdiction by simply skipping the borders.

9. During argument, Mr. Kaphale SC, representing the Accused Person, was emphatic that even if the Accused Person were somehow to try to convince his State security that he needed to be left to the privacy of his self, the security machinery of the State would keep him under constant surveillance and that any strange movement that he would make would trigger security alarms from the security agencies.

10. Put differently, Kaphale SC argued that effectively, the Accused Person, as the number two citizen of the country, is already always under the custody of the State. In this regard, requiring him to report

his continued presence in Malawi once every three months to the ACB serves no useful or practical purpose.

11. Defence Counsel generally argued that bail conditions should not just be imposed just for their own sake but for their utility in securing the presence of an accused person at his trial.

12. The State vigorously opposed the application. The affidavit in opposition was sworn by Mr. Isaac Nkhoma, Principal Investigations Officer for the ACB who, according to the affidavit, is one of the investigators seized with this matter on behalf of the State.

13. Mr. Nkhoma, in his affidavit, agrees with the Accused Person's assertion that the condition on reporting to the ACB is meant to ensure his availability for trial, but he firmly denies that owing to the status of the Accused Person, the ACB always knows of his movements and whereabouts.

14. In view of this situation, the Mr. Nkhoma states that it is proper that the requirement that the Accused Person should be reporting to the ACB should remain.

15. Mr. Nkhoma avers that the ACB is handling many cases in the country such that it would be very difficult, if not impossible, for it to assign its officers just to concentrate on finding schedules or records of movements of the Accused Person herein as a way of assuring itself of his availability.

16. In any event, the State argues, relying on such information may not be proper for a prosecuting agency.

17. Mr. Nkhoma depones that the lower Court already considered the status of the Accused Person when setting the bail conditions and that

the interval for reporting, namely once every three months, attests to this.

18. On the issue of the existence of Government protocols when it comes to leaving the jurisdiction, the State takes the position that the ACB and indeed the courts are not part of such Government protocols, and that it would therefore not be safe to rely on them as a means of ascertaining the movements of the Accused Person. It was the State's argument that it is only the requirement to collect his Passport from the ACB or from the Court that would alert the ACB or the Courts of his movements or whereabouts.

19. The State therefore argues that the bail conditions as imposed by the lower court are reasonable, fair and not oppressive..

20. The State invites the Court to observe that bail conditions, by their very nature, take away some liberty from an accused person, and that they are not to be varied merely because they inconvenience an accused person.

21. The State therefore prays that the Accused Person's application be dismissed in its entirety for lack of merit.

22. The parties advanced a number of legal arguments in support of their respective positions.

23. Counsel for the Accused Person begun by referring to section 118 (3) of the Criminal Procedure and Evidence Code (CP & EC) which provides that:

> *"The High Court may, either of its own motion or upon application, direct that any person be released on bail or that the amount of, or any condition attached to,*

any bail required by a subordinate court or police officer be reduced or varied."

24. Counsel for the Accused Person argued that when granting an accused person bail, a court must principally be satisfied that it is in the interests of justice to do so, and that this has been interpreted by the courts to mean, as a paramount consideration, that there must be an assurance that the accused person will be available for his trial. In support of this proposition, Counsel cited the leading Supreme Court of Appeal decision in ***Republic v Mvahe*** (MSCA Criminal Appeal 25 of 2005) [2005] MWSC 2 (15 November 2005).

25. Counsel for the Accused Person proceeded to contend, and correctly so, that release of an accused person from detention pending trial can be with or without conditions, and that the law sheds light on how a court can exercise its discretion as to the conditions that it may impose for release of an accused person on bail. They cited, in this regard, section 118 (2) of the CP & EC which provides that: *"The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive."*

26. Counsel found further support from Guideline 7, under Part II of the Schedule to the Bail Guidelines Act (BGA) (Cap. 8:05 of the Laws of Malawi), which provides that: *"Any bail conditions given to the accused should not be unreasonable."*

27. Defence Counsel stated that what these authorities demonstrate is that the amount of bail should be fact sensitive, and that every accused person must be dealt with on the merits of his or her own circumstances.

28. They contended that while strict conditions may be appropriate for some people who are a flight risk, the same conditions would make bail excessive for people who present a negligibly low risk of running away.

29. In other words, it was Counsel's submission that criminal justice protocols need not be applied in a one size fits all approach. As an authority for this proposition, they cited the case of ***The State on the Application of Kezzie Msukwa and another v The Director of the Anti-Corruption Bureau*** Judicial Review Case No. 54 of 2021. They invited the Court to recall that in that case, the Court held that while it was legally permissible to handcuff suspects to prevent them from fleeing, this was not a protocol that was to be used indiscriminately, and that the arresting law enforcer has discretion to dispense with the usage of handcuffs in appropriate cases where there is very little risk of the suspect fleeing. Counsel argues that, by parity of reasoning, it will not be in every case where an accused has been arrested that he or she must be compelled to be reporting to the arresting and/or prosecuting agency or indeed to surrender his or her travel documents.

30. Counsel proceeded to argue that in fact, there may be cases when an accused person may be released on his own recognizance, and they urged that the present one is one such case.

31. Counsel invited the Court to take judicial notice that in the case of ***United States v Donald Trump and another***, the former President of the United States of America, after his arraignment in a US Federal Court was released without conditions, both the Prosecution and the Judge deeming that he was not a flight risk. Counsel thus wondered why, in Malawi, we should think that a sitting Vice President of the Republic would flee his trial as to require him to surrender his Passport and to be reporting to the ACB. The Court must quickly point out that despite all its earnest efforts to find a copy of the decision in U***nited States v Donald Trump and Another*** as cited by defence Counsel, the Court failed to find a copy of this decision, and unfortunately defence Counsel did not furnish the Court with a copy. The internet link provided did not direct the Court to the text of the decision either. In the result, the Court is unable to place any weight to this decision.

32. Counsel for the Accused Person contended that the gravamen of the Accused Person's submission and prayer is that there must be a reasonable nexus between the conditions for bail and ensuring that the Accused Person attends his trial, and that anything else that exceeds what is reasonable for securing the attendance of the Accused Person for his trial makes the bail condition unreasonable and the bail excessive.

33. On their part, Counsel for the State invited the Court to note that in the case of ***Kettie Kamwangala v the Republic*** MSCA Miscellaneous Criminal Appeal No. 6 of 2013, it was stated that:

> *"beneath every criminal trial is the need for the accused person to attend trial on all set days, times and places. It is [a] cardinal point therefore that whatever conditions attach to an accused's release from detention, they should specifically emphasize those that ensure that the accused finds it difficult, impossible or unattractive to miss court or escape the jurisdiction. In the alternative, those which make it attractive for the accused to attend court."*

34. State Counsel argued that it therefore follows that bail conditions, by their very nature, take away some liberty from an accused person. They cited the Court's decision in the case of ***Republic v Dr Cassim Chilumpha and Yusuf Matumula***, Criminal Case No. 13 of 2006, where Nyirenda, J, (as he then was), stated that any condition as to bail is obviously a restraint on liberty of an accused person. Counsel for the State thus contended that bail conditions should not be varied merely because they inconvenience an accused person.

35. State Counsel reiterated that the whole essence of imposing bail conditions is to ensure that the Accused Person will be available for all

the dates that the case may be set down for hearing. They stated that the interests of justice require that there should be no doubt that the Accused Person shall be present to take his trial upon the charge in respect of which he has been committed. They cited the case of ***John Zenus Ungapake Tembo and others v The Director of Public Prosecutions***, MSCA Criminal Appeal No. 16 of 1995 in support of this contention.

36. It was the prosecution's argument that removing the conditions in question will create a doubt as to the Accused Person's availability to attend trial as the ACB will not be able to ascertain the movement and availability of the Accused Person. The proposed means of ascertaining his availability, they stated, are outside the control of both the ACB and the Court. In this respect, they argued that it was not in the interests of justice to vary the conditions.

37. Prosecution Counsel cited the South African case of ***Martin Lennard Korver v The State***, Case number A 188/2021 as authority for the proposition that the key basis for a reconsideration of originally imposed bail conditions is a material change in circumstances.

38. Counsel argued that bail conditions may be varied if there has been a change in circumstances of the accused or the case itself from the time that the bail conditions were set.

39. It was contended that in ***Republic v Chilumpha*** *(supra)*, where the accused was likewise a sitting Vice President, the court allowed the State's application for variation of bail conditions after the State submitted that there was a change in the circumstances of the case. Counsel contended that in the ***Chilumpha case***, the Court agreed with the defence's submission that the application could only be considered where there are changes in circumstances.

40. State Counsel then proceeded to argue that in the present case, there is nothing that has changed to warrant a variation of the bail conditions. They submitted that this was so considering that the lower court granted bail to the Accused Person whilst he was already the Vice President of the Republic of Malawi. They stated that when setting the conditions, the Court below was fully aware of the status of the Accused Person and the court deemed it fit to attach such conditions to his bail. The conditions, they argued, are not punitive, inappropriate, or equal to a denial of bail.

41. Counsel contended that the accused has not provided any ground in support of this application except asserting that he is the Vice President of the Republic. Counsel proceeded to invite the Court to observe that in the case of ***Republic vs Francesca Masamba***, Criminal Case No. 125 of 2020, Justice Mtalimanja dismissed an application on similar grounds made by the accused person when she asked for bail variation mainly because she is a sitting Member of Parliament who wanted to be accessing her Passport by way of agreeing with the State and not through an application to the court. The court further stated that bail conditions are not to be varied without a cogent basis.

42. All in all, the prosecution submitted that the conditions of bail herein are not cumbersome in any way because they are not preventing the Accused Person from exercising his right of movement or to do any job, and that they are neither oppressive nor unreasonable. On the contrary, the prosecution argues that the conditions are in the interests of justice and they thus invite the Court to dismiss the application for lack of merit.

43. The Court greatly appreciates the great industry in research, and indeed the illuminating arguments that Counsel advanced, both orally and in writing before the Court. These have been very helpful to the Court in coming up with the present decision.

44. The Court wishes to begin by observing that it is very rare that a sitting Vice State President, finds himself or herself juggling his or her affairs between discharging his or her official functions on the one hand, and answering to criminal charges and attending to the attendant criminal legal processes in respect thereof, on the other. The Accused Person herein finds himself exactly in that rare circumstance.

45. In the present application, the Accused Person seeks relief in the form of relaxation or complete removal of bail conditions imposed upon him pending his trial and generally during the currency of the criminal court proceedings against him.

46. The Court is mindful that in applications of this nature, it is duty bound to consider the interests of both the Accused Person and the prosecution - See the case of ***Amon Zgambo v Republic***, Miscellaneous Criminal Appeal No. 11of 1998.

47. The Court reminds itself that the right to be released from detention pending trial is constitutionally entrenched under section 42(2)(e) of the Constitution. The section provides that:

> *"Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right to be released from detention, with or without bail unless the interests of justice require otherwise"*

48. The philosophy of the section is clear: any person arrested and detained on suspicion of the commission of a criminal offence, is entitled to be released from detention unless the State provides satisfactory justification that makes it evident that the interests of justice require his or her further detention.

49. The provision also clearly suggests that once a decision that such an accused person be released from detention has been made, the

detaining authority or the Court as the case maybe, may release such person from detention with conditions or without conditions pending and for the duration of his or her trial. In the case of ***John Banda v Republic*** (Misc. Criminal Cause 136 of 2000) 2000 MWHC 31 (16 November 2000), Chikopa, J (as he then was), provided a proper exposition of the import of section 42(2)(e) of the Constitution. He stated that:

> *"Bail refers to the condition(s) on which one regains his/her liberty. That is clear from section 42(2) (e). It says a detainee has the right, inter alia, to be released from detention with or without bail. One cannot in my opinion apply for bail. It is an anomaly. You apply for your liberty to be restored. In simple language to be released from detention. It will then be up to the court to release you with or without bail. Again in simple language with or without conditions…As I understand it the section only spells out what rights a detainee has. One of them is to be released from detention unless the interests of justice require otherwise. When the detainee comes to court he/she is only restating the right and asking the state to show cause on a balance of probabilities why his/her liberty should not be restored to him. It is then up to the court to set the applicant at liberty on such conditions as it deems fit. The correct thing to do herein, in the opinion of this court, was to use the very words that section 42 (2)(e) itself uses. The applicant should have sought to assert his right to liberty and invited the state to show cause why he should not be released from detention. It would then have been up to this court to restore such right with or without bail."*

50. The Court also wishes to address, at this juncture, one interesting issue that arose in the course of argument. This was the

question of burden of proof in applications for variation of bail conditions.

51. Counsel for the State contended that in such applications, the burden squarely rests on the accused person to show and satisfy the Court that his or her conditions should be varied. Counsel argued forcefully, in this regard, that the accused person must show that there has been a change of circumstances warranting the variation of conditions.

52. Counsel for the Accused Person, on the other hand, argued to the contrary. Mr. Kaphale, SC, contended that the burden of proof never shifts and that it remains squarely on the prosecution, whether it be upon an application for release from detention or an application for variation of any conditions that the court may have imposed on the accused person upon release.

53. Listening carefully to Mr. Kaphale, SC's argument, in essence, his proposition was that all the accused person needs to do, in any such instance, is to raise before the court the desire to have his or her bail conditions varied, and that it there and then becomes the duty of the prosecution to demonstrate that it is in the interests of justice that either bail conditions should be imposed (at first instance) or, where bail conditions have already been imposed, that such conditions should be maintained.

54. In other words, in his submissions, Mr. Kaphale, SC did not seem to suggest that there is need for any minimum threshold of satisfaction on the part of the Court before it may find it plausible to consider varying such bail conditions. His argument seemed to suggest that once an accused person says to the Court *"I desire to have my conditions for release from detention varied by the Court"*, it, *ipso facto* (by that very fact), becomes the duty of the Court to vary the conditions unless the State can show that the interests of justice do not require such

variation. In other words, the contention was that unless the State so demonstrates, the conditions must be varied as a matter of course.

55. This no doubt is the approach that Courts adopt or ought to adopt in original applications for release from detention by accused persons. An Accused Person is entitled to simply say that "following my arrest and detention, I am now asking for release from detention as a matter of right", and the burden at that point shifts to the State to demonstrate that the interests of justice require otherwise, failure of which the Court is bound to release the accused person from detention as prayed for, unless the Court itself likewise has a basis and explains such basis, that the interests of justice militate against the release sought. The question is whether this is equally the position that obtains in applications for variation of bail conditions.

56. The Court thinks not.

57. The guiding principle on the issue of burden of proof is that age old principle in adversarial jurisdictions, namely, *ei qui affirmat non qui negat incumbit probatio*, that is to say that the one who alleges the affirmative must prove and not the one who denies. Thus, in the case of ***Commercial Bank of Malawi v Mhango*** [2002-2003] MLR 43 (SCA), Msosa, JA (as she then was) stated, at page 45, that:

> *"In general, the rule is Ei qui affirmat non qui negat incumbit probatio which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in* ***Constantine Line v Imperial Smelting Corporation*** *[1943] AC 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case*

because in the nature of things, a negative is more difficult to establish than an affirmative."

58. It follows, in this Court's view, that where a Court grants an application by an accused person for release from detention pending his or her trial with bail (with conditions), and such accused person subsequently comes back to Court arguing, as the accused person herein currently does, that the conditions that the Court originally imposed were unreasonable, unfair or unnecessary with no discernible nexus with the purpose for which they were imposed, it is, in such a circumstance, the accused person who raises the allegation.

59. In the circumstances, it is his or her initial burden to satisfy the Court that such conditions are indeed unreasonable or unnecessary. The Applicant (accused person) may, in this regard, provide evidence to satisfy the court that there has been a significant change in circumstances since the initial grant of bail, or generally he or she may otherwise show that there are good and substantial reasons for modifying the existing conditions.

60. What then should be the test to be satisfied by the applicant (accused person) in this regard?

61. In the case of ***Nelson Jasi v Republic***, Criminal Case No. 64 of 1997, Mwaungulu, J (as he then was) held that where, in a criminal proceeding, an accused person raises an allegation of violation of a human right, such as the right not to be compelled to make a confession statement:

> *"The applicant has just to raise a* ***prima facie*** *case of violation. The onus then shifts to the State to justify the legislation as a reasonable limitation recognised by human rights standards and necessary in an open democratic society."*

62. Thus, where a defendant is applying for variation of bail conditions on the grounds that they are both unreasonable and unnecessary owing to a lack of nexus with the purported purpose for which they were imposed, essentially such defendant is alleging that the said conditions amount to an unnecessary restraint on his right to personal liberty under section 18 of the Constitution, and perhaps other related fundamental rights. This, to the Court's mind, is less a matter of an infringement of his right to be released from detention with or without bail under section 42(2)(e) of the Constitution because, in such a case, the defendant has already been released from detention with bail.

63. The Defence seemed to suggest that the import of the right under section 42(2)(e) of the Constitution is that an accused person has a right to be released from detention without bail (or without conditions), unless the interests of justice require that release from detention be with bail.

64. The Court holds a different view.

65. The right under section 42(2)(e) of the Constitution is a composite right whose major thrust is that a detained accused person has a right to be released from such detention.

66. In the view of this Court, contrary to an oft-stated proposition that the right to be released from detention under section 42(2)(e) of the Constitution in general lies at the discretion of the Court, this Court holds that the position is more nuanced than such a simplistic expression. That provision has two prongs, one a completely rights-based and therefore triggering a duty or obligation on the part of the Court, and another discretionary.

67. The Court opines that the aspect of the right *to "be released from detention"* under this section is not really a discretionary matter for the

Court. It is obligatory for the Court to release an accused person. That is the starting point. It is a matter of an entrenched constitutional right. That obligation may only be displaced by the State demonstrating, or the Court itself otherwise appreciating, that there are facts or circumstances that demonstrate that the interests of justice lie contrary to an order for such person's release from detention.

68. According to the Supreme Court of Appeal decision in ***Mvahe v Republic*** *(supra),* that is the starting point in every case regardless of its seriousness.

69. It follows, according to the Hohfeldian theory of legal relations (Hohfeld's jural correlatives), that where an accused person has a right to be released from detention, correlatively, the Court has a duty or is under an obligation to release him or her from such detention. This right is of course limited under section 44(1) of the Constitution, and the State or the Court is entitled to demonstrate that legitimate and lawful limiting factors, that further the interests of justice, exist to limit the right.

70. This concept of duty on the part of the Court is, in this Court's view, not conceptually consistent with the idea of an expressed and entrenched constitutional right the exercise of which is then held to lie at the mercy of the duty bearer's general discretionary powers. For every right held and exercisable by a *"right holder"* to have meaning, there must be a corresponding duty or obligation on a *"duty bearer"* rather than discretion. It follows, therefore, in the constitutional context, that the idea of a constitutional duty, which necessarily correlatively arises in relation to the concept of a constitutional right, imposes an obligation, albeit with limitations, on the Court rather than some amorphous discretionary power.

71. That said however, the right is subject to an internal limitation within the said section (42(2)(e) of the Constitution). This internal limitation is that the Court may deny the release of such accused

person from detention if it is satisfied that the interests of justice require further detention. A broad and long stream of cases, domestic as well as from the broader commonwealth family of nations, shows that it is the duty of the prosecution to demonstrate the existence of any factors that would tilt the interests of justice against the release from custody of a detained accused person.

72. What, however, lies in the discretion of the Court, upon a careful analysis of section 42(2)(e) of the Constitution, is whether, having decided that the interests of justice do not require the continued detention of an accused person (in other words having decided to release the accused person from detention), the release of such accused person should be *"with or without bail"*. In other words, the discretion of the court lies squarely on the question of whether the release should be *"with or without conditions."*

73. The idea that the right under section 42(2)(e) of the Constitution is to be understood in this bifurcated sense is consistent with the position held by the Malawi Supreme Court of ***Dorothy Mbeta & Others v Republic***, MSCA Criminal Appeal No. 15 of 2016, where the Court said:

> *"Conceptually, therefore, a citizen applying under the constitutional right need not apply for bail; a citizen must apply for release from detention. If the court refuses release, the bail question disappears. On the other hand, if the court allows release, the question becomes whether the release can be with or without bail."*

74. There are, therefore, as stated earlier, two stages that the Court goes through. The first stage, namely that of releasing a detained accused person unless the interests of justice require otherwise, is obligatory. If the State fails to show that the interests of justice require further detention, and indeed if the Court itself finds and states no

reason to show that there are factors tilting the interests of justice against release from detention, then the Court is under a duty to release the accused person from detention. It is no longer a matter of discretion.

75. Once this duty-based position arises and crystallises, the next stage is for the Court to decide whether the release – which release at that point is now a foregone conclusion, should be with or without bail, and it is here where the court's powers are discretionary. The Court is at liberty to exercise its judicious discretion in this regard. An application for variation of bail conditions falls into this discretionary window for the Court.

76. The Court therefore rejects the argument that the *"interests of justice"* test under section 42(2)(e) of the Constitution equally applies in instances of application for variation of bail conditions as it does in ordinary applications for release from detention under that section, and thus pushing the initial and indeed overall burden of proof to the prosecution.

77. Thus, as stated earlier, unlike in the initial application for release from detention, with or without conditions, where the applicant (accused person) is not legally required to show a *prima facie* case (although in practice establishing such a *prima facie* case helps in order for the Court to evaluate whether any alleged contrary factors should be upheld by the Court); in an application for variation of bail conditions, there is an initial legal burden on the accused person to raise a *prima facie* case that the conditions imposed on him or her are an unreasonable or unnecessary restraint on his or her right to personal liberty. Perhaps the argument may extend to other concomitant rights such as human dignity under section 19(1) of the Constitution.

78. Once such a *prima facie case* is made out, this legal burden then shifts to the prosecution to establish, on a balance of probabilities, that

the conditions imposed are not an unnecessary or unreasonable restraint on the accused person's fundamental rights such as the right to personal liberty or human dignity, among others.

79. Put differently, when it comes to variation of bail conditions, the test applicable is not the internal limitation test prescribed under section 42(2)(e) of the Constitution, but the general human rights limitation test provided for under section 44(1) of the Constitution.

80. Pausing there, the Court now proceeds to address some of the general principles that it considers when making decisions related to the release of an accused person from pre-trial detention, including whether or not bail conditions should be imposed.

81. The Courts have emphasised, in a long stream of authorities, that when considering whether or not to release an accused person from detention pending his or her trial, the paramount consideration is whether, if so released, the accused person will be available for trial; and that the same principles that a Court applies when considering the granting of bail are the ones that it takes into account when presented with an application for variation of bail conditions. This position was articulated with clarity in the case of ***Kwacha Ghambi v Republic***, Criminal Appeal No. 28 of 1998, where Ansah, J (as she then was) stated that:

> *"the most important consideration to take into account when deciding whether the accused person should be granted bail or not is the likelihood of the accused attending the trial on the date for the hearing of his or her case bearing in mind that bail must not be withheld merely as a punishment. In the case at hand, it is not a question of the applicant being released on bail but variation of bail conditions. I am of the view that the same principles that are considered in consideration for bail also apply in this case.Therefore*

> *it can rightly be said that conditions of bail must not be imposed merely as a punishment…The Court can in its discretion, vary bail conditions. However it must always be remembered that the chief purpose for imposing conditions to bail is really to secure attendance at the trial."*

82. In ***Aubrey Mbewe & Another v Republic,*** Miscellaneous Criminal Application No. 11 of 1995, Mtambo, J (as he then was) pointed out a few important matters relating to the right to be released from detention under section 42(2)(e) of the Constitution. First, he pointed out the centrality of the principle of opulence, namely the need for an assurance that an accused person will attend his or her trial. He stated in this regard that:

> *"It should always be remembered that the primary consideration whether an accused should not be detained pending trial is whether or not he will attend court for his trial whenever required to do so, and that the chief purpose for imposing conditions to bail is really to secure such attendance."*

83. Secondly, the Court restated the test – that is to say the standard of proof or satisfaction that a Court must have regarding the attendance of an accused person at his or her trial. The learned Judge stated that: *"the test is whether it is probable that the accused will appear to take his or her trial"*. This articulation of the test was a restatement of an earlier proposition of the Court in ***Njoloma v. Rep***., 1971-72 ALR Mal. 393, where Skinner CJ stated, at 394, that:

> *"**The test of whether bail should be granted or refused is whether it is probable that the accused will appear at his trial.** The test should be applied by reference to various considerations which I have borne in mind and which are set out in*

> ***Archbold, Criminal Pleading, Evidence & Practice****, 37th ed., at 70, para. 203 (1969).”*

84. Thirdly, the learned Judge in ***Aubrey Mbewe & Another v Republic, (above)*** stated the principle that when there is no doubt as to the availability of an accused Person for his/her trial, the general practice of the court should be to release the accused person from detention unconditionally. The learned Judge said:

> *“[W]henever there is no doubt that an accused will attend court, there should be no need for conditional bail, for why should there be. The requirements of bail are merely to secure the attendance of the accused at his…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 or she can be located.”*

85. This principle was also stated by Ansah. J (as she then was), in ***Kwacha Ghambi v Republic*** (above) where she said that:

> *“Obviously…where there is no doubt at all that an accused will attend court, then an accused should be released on bail without any conditions.”*

86. In the case of ***Pandirker v. Rep.***, 1971-72 ALR Mal, 201, Chatsika J (as he then was), stated the nexus between the presumption of innocence and the release of an accused person from detention. He stated that:

> *“Before a person is convicted of any offence, he is deemed to be innocent and provided the court is satisfied that the accused person will report at his*

> *trial, it will not find it necessary to deprive him of his freedom unreasonably. The reverse is true with a person who has been convicted, because until the conviction is quashed by a superior court he is deemed to be guilty and does not deserve the free exercise of his freedom."*

87. Similarly, in ***Saidi v Republic***, 8 MLR, at p. 119, the High Court stated that:

> *"It must further be observed that the guilt of the applicant will only be ascertained after he has been found guilty by a competent court and convicted. Before then he is presumed innocent. In such cases, unless the contrary, as indicated above, is proved, bail must be granted readily."*

88. The Court has considered whether the Accused Person herein has established a *prima facie* case that his bail conditions be varied, that should trigger a consideration of representations from the State on the essence and efficacy of the bail conditions herein, or the lack thereof. The Court is satisfied that he has reached the threshold of a *prima facie* case for variation.

89. The Accused Person has highlighted how the occupation of the high office of the Vice President of the Republic that he holds, entails that he is heavily guarded and protected by the security agencies of the State, providing a far greater assurance that he may not simply skip the borders and vanish from the jurisdiction without State security stopping him. He, in this regard has queried what a once-in-three-months visit to the ACB achieves as compared to the machinery of the State security agencies that are with and around him all the time. This, *prima facie*, is a sound query that should trigger a consideration of the responses from the State on the point.

90. In similar vein, the Accused Person has queried the necessity and efficacy of his Passport being held by the Court. Just like on the issue of the reporting obligation to the ACB, the Court finds likewise that on this ground as well, the Accused Person has established a *prima facie* case that should trigger a careful consideration of the State's responses on the point, if any.

91. In dealing with the present application, the Court has carefully considered the Bail Guidelines Act. The Bail Guidelines Act prescribes four major specific considerations that a Court may take into account when dealing with the issue of release from detention of an accused person, with or without bail. These are:

(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; and

(d) in exceptional circumstances, the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

92. The Court listened very carefully to the oral arguments and, also scrupulously examined the skeleton arguments and factual depositions made by both parties in their respective affidavits. The parties rested on the first consideration, namely the likelihood that the Accused Person herein would evade his trial.

93. The Court did not get the slightest suggestion from the State that the Accused Person herein is likely to influence, intimidate or otherwise interfere with state witnesses, or that he would wish to conceal or destroy evidence, and thus necessitating specific conditions to take care of that concern.

94. Neither did any of the parties, and more so the State, address the Court on the likelihood that the Accused Person would endanger the safety of the community or any particular person or that he is likely to commit an offence and hence expressing the need for the Court to impose appropriate conditions meant to address that issue.

95. Finally, there was again not the slightest indication of the likelihood of the exceptional circumstance of the Accused Person disturbing the public order or undermining the public peace or security in order to trigger the imposition of some conditions specifically tailored to address that eventuality.

96. Thus, the central issue that the Court has to determine is whether the Accused Person, who happens to be the Vice President of the Republic, is likely to evade his trial if no conditions are imposed requiring him to (a) deposit his Passport with the Court and (b) reporting to the ACB once every three months.

97. The Court will begin with the second condition, namely the condition to report to the ACB once every three months. How does this condition achieve the objective of ensuring that the Accused Person will not evade his trial? Counsel for the State suggested that unless the Accused Person shows himself once every three months to the ACB, the ACB would not know whether or not he is in the country.

98. The Court found this argument rather strange. To suggest that the whole ACB would have no means of knowing whether the Vice President of the country is still in Malawi or not unless he shows himself

up at the ACB offices once every three months is a suggestion that defies the belief or appreciation of this Court.

99. Senior Counsel Kaphale argued, in response to the ACB's argument on this score, that if indeed the ACB would not be in a position to know where the Vice State President of the country is, as and when they wish to know, unless he shows up at their offices once every three months, then the country should be really worried about the competence of its ACB.

100. The Court of course has confidence in the capacity of the ACB to ascertain the whereabouts of the Vice President of the country at any given time. This is precisely the reason why the Court found and still finds the ACB's argument on this point rather strange and incredulous.

101. Simply put, this Court finds that the condition requiring the Accused Person, who remains the sitting Vice President of the Republic, to be reporting once every three months to the ACB is unnecessary for the purported reason for which it was imposed. **It is therefore hereby set aside**.

102. Perhaps the mischief sought to be cured could be effectively addressed by a less restrictive or demanding condition on the Accused Person. **The Court opines that the said mischief could be addressed by an Order, which the Court hereby makes, that the Accused Person should simply cause his office to be providing advance written updates to the ACB regarding his his actual place of abode within Malawi, once every two weeks,** until the conclusion of the trial in this matter, or a further order of the Court.

103. In that way, the desire of the ACB, that it should know the general whereabouts of the Accused Person and specifically as to whether the Accused Person is still in Malawi, would be addressed. If the ACB would have any doubts at any given time in this regard, I agree with the Accused Person that the ACB would, and indeed should, be able to

easily verify such a fact given the office that the Accused Person herein occupies.

104. As a matter of fact, it appears to this Court that the ACB will be better informed about the whereabouts of the Accused Person under this scheme, than a scheme whereby he would only report to them once in three months. At the same time, the variation herein spares the Accused Person the trouble of having to personally physically present himself to the ACB once every three months, an exercise that this Court has already found to be of very little value, if at all. Instead, he will simply cause his office to be providing biweekly updates to the ACB on his actual place of abode within Malawi at the given time.

105. The next issue relates to the condition to have the Accused Person's Passport deposited with the Court. Once again, the Accused Person queries the relevance of this condition. In any event, he argues, it is Government protocol that he may only leave the jurisdiction with the leave of the State President who, in turn, ultimately has overall superintendence over all of the Republic's security agencies.

106. The prosecution, on its part, fears that if the condition of having the Passport deposited with the Court is removed, the Accused Person may evade his trial. When specifically queried on whether Counsel meant that the Accused Person herein was a flight risk, Counsel seemed to equivocate, but ultimately firmly maintained that the condition was important in order to secure the Accused Person's attendance at trial.

107. In response to the argument that the Accused Person, as the country's Vice President, is always surrounded by police security which would make it almost impossible for him to evade State security and disappear from the jurisdiction, prosecution Counsel stated that the ACB does not trust the Malawi Police Service. Both the Court and Senior Counsel Kaphale asked Counsel Khunga to clarify on what he had just said, and Counsel reiterated that as far as this matter was concerned, the ACB did not trust the Malawi Police Service. Kaphale, SC asked

whether perhaps Counsel wished to withdraw that serious statement on behalf of the ACB, and Counsel firmly declined to do so.

108. The clear suggestion from the prosecution seems therefore to be that, in so far as the present matter is concerned, on the issue of assurance for the availability of the Accused Person herein for his trial, they believe that the Police cannot be trusted to prevent him from escaping from the jurisdiction if he ever wished to do so. Unfortunately, the prosecution did not provide any reasons why they have that feeling or why they form that opinion.

109. Without any plausible basis or reason advanced by the prosecution for the lack of faith in the institution of the Police on this important issue, this Court is unable to join the prosecution on their journey of mistrust. The Court forms the view that as the Vice President of the Republic, the Accused Person herein is the second most highly protected citizen of Malawi, and that those who have been entrusted by the State with the onerous responsibility of providing him with security are among the most competent, best trained and most trusted men and women in the Malawi uniform to perform that task.

110. All in all, the Court finds that the objective sought to be achieved by the requirement that the Accused Person herein, being the sitting and functional Vice President of the Republic, should deposit his Passport with the Court, can be addressed by other less restrictive or intrusive means without prejudicing the purpose for which the condition was originally imposed.

111. **The Court hereby orders** that the condition that the Accused Person should have his Passport deposited with the Court **is hereby set aside.**

112. Again, the Court opines that the mischief that this condition sought to cure can be addressed by less restrictive or demanding

means. **The mischief may be addressed by an Order requiring that such Passport be kept in the custody of the State President**, **which Order the Court hereby makes.**

113. In arriving at this decision, the Court has considered a number of things.

114. First the Court has considered what the Accused Person himself has stated in relation to this issue. By his own admission, upon affidavit evidence, the Accused Person herein states that invariably, as Vice President, he does not travel outside Malawi without seeking the permission of the President. In view of this new condition therefore, once the President approves the Accused Person's travel, it must necessarily follow that the President will also release his Passport. It therefore seems to this Court that for purposes of travel outside Malawi, the requirement of having his Passport in the custody of the President effectively lessens the Accused Person's approval processes from two authorities, namely approval by both the Court and the President, to approval by a single authority, namely the President.

115. The President, in this peculiar circumstance, that concerns prosecution by the State against his second in command, is well-suited considering that his office is under a sacred oath, in terms of section 81 (1) of the Constitution, to preserve and defend the Constitution, and to do right to all manner of people according to law without fear or favour, affection or ill-will. This oath imposes constitutional duties on the President that he is bound to honour.

116. The duty to preserve and defend the Constitution, and to do right to all manner of people according to the law without fear or favour, affection or ill-will, includes ensuring that the legal processes in the various institutions of the country, including in the Courts, are upheld, honoured and supported. The President, therefore, in this Court's view, will, as the Court believes he always does, live to his constitutional oath

to treat this matter according to law and deal with the Accused Person's circumstances without fear or favour, affection or ill-will.

117. In addition to his sworn constitutional obligations, the Court also reckons that the President is singularly privy to the highest level of both criminal and general security intelligence in the country, and therefore his office is well-suited to make ultimate decisions on approval of foreign travel by his deputy in these unusual circumstances where his said deputy happens to be undergoing a criminal prosecution.

118. It follows, therefore, that during the currency of the criminal proceedings against the Accused Person, whenever the President receives a request from the accused person to travel outside the jurisdiction, or indeed whenever the President himself delegates a responsibility to the Accused Person that requires the latter to travel out of the jurisdiction, the State President will scrupulously direct his mind to the available security and other intelligence information at his disposal, and any other relevant factors in arriving at his decision.

119. In addition, the Accused Person must inform the ACB and the Court about travel outside the jurisdiction of Malawi, at least 72 hours before any such travel, with appropriate general details relating to such travel, such as the purpose of the travel, the departure point, the final destination, any transit jurisdictions, and the date of return to Malawi. The Court emphasises that this requirement is simply that of informing the ACB and the Court in writing and not necessarily seeking permission. This 72-hour window should provide the ACB with an opportunity to make urgent representations to the Court if they would feel the need to do so under certain circumstances.

120. This Court has made these decisions, whose overall effect is to relax the burden of the bail conditions on the Defendant, because the Court is satisfied that he poses a very low flight risk, if at all, given the State protection machinery that surrounds him almost at all material

times. The Court is however, at the same time, mindful that it does not have the farsighted and unmistakable foresight of the proverbial clairvoyant, and hence the need for the few cautious mitigated conditions that it has maintained.

121. The Court must also quickly address a point that the parties dealt with during hearing. This related to the issue of whether an application for variation of bail conditions may only be brought to the Court if there has been a change in the circumstances of the Accused Person. Counsel for the State argued that this was so, in view of Guideline No. 10 in Part II of the Schedule to the Bail Guidelines Act.

122. Counsel for the Accused Person argued that this was not the case, and that a reading of section 118(3) of the CP & EC under which the application had been brought made it clear that the issue of change of circumstances is not the lone reason for a Court exercising its variation powers.

123. Section 118(3) of the CP & EC provides that:

> *"The High Court may, either of its own motion or upon application, direct that any person be released on bail or that the amount of, or any condition attached to, any bail required by a subordinate court or police officer be reduced or varied."*

124. Guideline 10 abovementioned on the other hand provides that:

> *"Where the accused has been refused bail he or she may bring a fresh application before the same magistrate or court, or another magistrate or court, only if there has been a change of circumstances since the earlier application."*

125. The Court's reading of these provisions makes it clear that Guideline 10 only applies in instances where an Accused Person has been refused bail. There was some discussion in Court about what that means, with a suggestion from the prosecution that the word *"bail"* in Guideline 10 should only be understood to mean *"conditions"*. Obviously, such reading is destructive to the provision as, when so understood, the provision makes no sense at all. The provision would read:

> *"Where the accused has been refused 'conditions' [or 'has been refused conditions for release'] he or she may bring a fresh application before the same magistrate or court, or another magistrate or court, only if there has been a change of circumstances since the earlier application."*

126. Now this would amount to destructive judicial analysis and interpretation, giving the provision an import which clearly was never intended by the Legislature. In the words of Lord Denning in ***Seaford Estate v Asher*** [1949] 2 KB 481, *"We sit here [in the Courts] to find out the intention of Parliament and of Ministers and carry it out… and making sense of the enactment than by opening it up to destructive analysis."*

(The words *"in the Courts"* in the quotation above have been added by this Court for contextual clarity)

127. The true meaning to be ascribed to Guideline 10 in Part II of the Schedule to the Bail Guidelines Act is that the phrase "w*here the accused has been refused bail"*, as expressed in that provision, is to be understood in its normal common language sense, which is also frequently used loosely by the courts, to mean an instance where an application by an Accused Person to be released from detention, with or without bail, has been refused by the Court.

128. On the other hand, it is clear that, section 118(3) of the CP & EC, based upon which this application has been brought, does not have an exhaustive list or indeed any list at all of reasons based upon which the High Court can vary bail conditions. As was held in the case of ***Chisale v Republic,*** Homicide Bail Cause No. 134 of 2020 by Kalembera J (as he then was), in matters of bail, *"each case…must be decided on its own unique facts, and on its own merits."* The Court therefore finds that the applicable provision governing applications for variation of bail conditions is section 118(3) of the CP & EC, rather than Guideline 10 of the Bail Guidelines Act.

129. The Court further finds that there is no statutory requirement under Malawian law that an Accused Person who has already been released from detention on bail can only apply for variation of bail conditions if there is a change of circumstances. Whilst change of circumstances is clearly one of the grounds that may persuade a Court to vary bail conditions, it is not the only ground or reason based on which the High Court may vary bail conditions.

130. The Court will therefore exercise its judicious discretion, given the unique facts, circumstances and merits of each case to make a determination on whether to vary bail conditions or not under section 118(3) of the CP & EC.

131. Finally, the Court wishes to mention, in passing, that during the hearing, the Court asked Counsel to address it on whether the unlikely but possible event envisaged by the Constitution, of a Vice President having to act as President in the event of the President becoming incapacitated under Section 87 of the Constitution, ought to inform the Court's considerations on the issue of bail conditions, or indeed on the variation of bail conditions as in the instant matter, for any accused person who happens, at any given time, to be the sitting Vice President of the country.

132. Section 87(1) of the Constitution provides that:

> *"Whenever the President is incapacitated so as to be unable to discharge the powers and duties of that office, the First Vice-President shall act as President, until such time, in the President's term of office, as the President is able to resume his or her functions."*

133. The Court recalled that in the case of the ***State and 3 others; Ex Parte: Right Honourable Dr. Cassim Chilumpha***, SC [2006] MLR 406 (HC) (the ***Chilumpha case)***, the High Court determined that whilst in civil matters, under section 91(1) of the Constitution, presidential immunity from civil suits applies to both the person of the President and any person performing the functions of the President, section 91(2) of the Constitution is very narrow and specific when it comes to immunity from prosecution in criminal matters. The immunity only applies to the person who is, for the time being, the President of Malawi. Thus, in the ***Chilumpha case***, with reference to the import of section 91(2) of the Constitution, Chipeta J (as he then was) stated at page 425 that:

> *"The language employed unambiguously and specifically captures the President. Unlike in the civil immunity scenario, it makes no attempt, minor or major, to bring within the realm of this immunity, any extra person or persons, whether on basis of performing the President's functions, or on basis of any other criterion."*

134. It therefore follows that where the Vice President becomes Acting President under section 87(1) of the Constitution, according to the Court's interpretation in the ***Chilumpha case***, such Acting President would still not enjoy immunity from criminal prosecution because the person of the President would still be alive. The result of that scenario seems to be that even as an Acting President, he or she would remain

fully amenable to the fully fledged criminal trial process. In the circumstances, if he or she wished to travel outside Malawi during that period, where there was a condition restricting his or her travel out of Malawi, then he or she would have to make an application to Court seeking permission to leave the jurisdiction. Alternatively, he or she would at that point, have to make an application for variation of bail conditions so that his or her Passport should no longer be in the custody of the Court whilst he or she executes the role of Acting President of the Republic. Of course, the Court would, even in such an event, still retain its discretion on whether or not to grant such application for variation of bail conditions. A potential constitutional clash in the separation of powers might result.

135. As an Accused Person subject to bail conditions, but who is also an Acting President, the Vice President, even though still an Accused Person facing trial, he or she would have been immediately thrust into a presidential role where he or she would have to make the most sensitive and far-reaching decisions entrusted to the President under our constitutional system. This is so because the President, as Head of State and Government, and Commander-in-Chief of the Malawi Defence Force, is constitutionally entrusted with functions and responsibilities of utmost discretion and sensitivity. This is perhaps one of the reasons why the Constitution provides that office with immunity from the criminal process, so that the office holder is not distracted from discharging the ultimate responsibility of having overall charge of the Government and generally leading the entire nation.

136. It was under these circumstances that the Court sought to be addressed by the parties on whether these (and perhaps other potential constitutional scenarios) should inform the Court's decision when imposing bail conditions so that, where such an accused becomes Acting President, his or her first pre-occupation should not be to come back to Court to make application for variation of bail conditions so that

he or she, now as Acting President, may effectively execute the functions of the high office of the President.

137. The Court takes the view that perhaps there is a case to be made that these are issues that a Court would have to take into account, in appropriate cases, in the event of a sitting Vice President who is undergoing a criminal trial being required to assume the role of the President in an acting capacity.

138. However, the parties only cursorily addressed this issue during argument. In addition, the Court found, in the end, as shown above, that the application herein, in the specific circumstances of the present case, could be disposed of without delving deeper into this issue, or indeed applying the same.

139. The Court however still found it appropriate to flag the issues for possible future consideration. It is appropriate that in making its decisions, especially where they have constitutional implications, a Court must be forward-looking in a principled manner. As the famous jurist and legal philosopher Joseph Raz states, in his book *Between Authority and Interpretation: On the Theory of Law and Practical Reason,* Oxford: Oxford University Press, 2009), at page *355,* while the courts interpret or make decisions concerning the Constitution, they should be rightly *"moved by considerations of continuity"*, or in other words, that *"their interpretation should also be forward-looking."*

140. Thus, whilst in arriving at its decision in the present matter it was not necessary for the Court to take into account the constitutional considerations that it had flagged during hearing, as the application of ordinary bail principles has had a dispositive effect on the application, the Court opines that in an appropriate case, these are issues that a Court may have to substantially grapple with.

141. The application for variation of bail conditions therefore succeeds, to the extent determined above.

142. It is so ordered.

143. Made in open Court at Lilongwe this 1st day of August, 2023.

R.E. Kapindu

JUDGE