IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

HOMICIDE BAIL CAUSE NO. 134 OF 2020

IN THE MATTER OF SECTION 42 (2) (e) OF THE CONSTITUTION OF THE REPUBLIC OF MALAWI

AND

IN THE MATTER OF SECTION 118 (3) OF THE CRIMINAL PROCEDURE AND EVIDENCE CODE

BETWEEN:

NORMAN PAULOSI CHISALE CHISALE.....APPLICANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Mr Salamba, Senior Assistant Chief State Advocate, of Counsel for the Respondent

Mr Gondwe, of Counsel for the Applicant

Mr Maele, of Co-Counsel for the Applicant

Mr Ng'ambi, Official Interpreter

RULING

Kalembera J

This is an order on the Applicant's application for bail. The application is brought under section 42 (2) (e) of the Constitution of the Republic of Malawi as read with section 118 (3) of the Criminal Procedure & Evidence Code. The application is supported by an affidavit in support and an affidavit in response, both sworn by Chancy Thomu Gondwe, of counsel for the Applicant, as well as skeletal arguments. The Respondent has filed affidavits in response sworn by Andrew Salamba, of counsel for the Respondent, and Henry Atupele Malange, the leading police investigator respectively.

Before I deal with the issue of bail, I must state from the outset that the bail application was heard after the court had reversed the order of the learned Chief Resident Magistrate sitting at Blantyre in which he remanded the Applicant for seven days. Both parties agree that the order by the learned magistrate was unenforceable as the same was against the provisions of sections 161E and 161J of the Criminal Procedure & Evidence Code. This is so because under the said section 161E, the maximum period that a person accused of an offence triable in the High Court may be held in lawful custody pending his committal to the High Court is thirty days. And under section 161J an accused person in lawful custody is not precluded from applying for bail. Hence the seven day remand order imposed by the learned magistrate had to be reversed as it was against the law.

As regards the issue of bail, it is the Applicant's case as deposed that the Applicant was arrested on 17th July 2020 by Soche Police on allegation that he had intended to cause the death of one Sigele Aman, a woman. That the incident occurred on 20th May 2020 when the woman shot by a stray bullet. That the Applicant was being attacked by robbers who had come to his house in Chimwankhunda dam Township, and that in the course of self-defence, the Applicant shot in the air to scare away the robbers and accidentally, a stray bullet glazed the knee of the victim. That after the shooting the victim was taken to Soche Police by well-wishers where she was recorded a statement and referred to Queen Elizabeth Central Hospital.

The Applicant visited the victim in hospital on the same night of the accidental shooting where he assured her that he will take care of her, paid for all medical expenses and took her back to her village at Mpulula in Chiradzulu District. That the police recorded a case of accidental shooting. That the victim withdrew the

matter from the police and never wanted the Applicant to be prosecuted. It has further been deposed that the victim filed an affidavit with the police withdrawing the matter. That the Applicant has been assisting the victim way before the charge fo attempted murder was brought against the Applicant. That by assisting the victim it does not mean that the Applicant is interfering with a witness.

It is the Respondent's case as deposed that the State has never made a decision not to prosecute the Applicant. That the Applicant has not yet been committed to the High Court for trial. The Director of Public Prosecutions (DPP) has not yet received the case docket from the investigators, but that the DPP has 30 days from the 20th of July 2020 within which to commit the Applicant to the High Court for trial and that limitation period has not expired. That the Applicant has been coercing the victim to withdraw her complaint from the police in exchange for money. That this is an act of state witness and evidence interference. That the Applicant is also charged with serious offences of fraud and money laundering in another court of law, and that this demonstrates that the Applicant is not an honest person and that if released from custody on bail, he can use his wealth to interfere with other state witnesses and evidence.

That the state therefore strongly opines that it would not be in the interest of justice that the Applicant be released on bail pending committal to the High Court for trial. That investigations are through.

The main issue for determination is whether the Applicant should be released on bail or not.

I am extremely grateful to counsel on both sides for their detailed oral submissions and skeletal arguments.

The starting point must be the Constitution which is the supreme law of the land. Section 42 (2)(e) of the Constitution provides as follows:

"42 –(2) 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 –

(e) to be released from detention, with or without bail unless the interests of justice require otherwise."

Thus, the Applicant, just like any other person arrested for, or accused of the commission of an offence has a constitutional right to bail. But as both parties have rightly observed this constitutional right to bail is not an absolute right. It is subject to the interests of justice. In the now commonly cited case of **Fadweck Mvahe –v – The Republic, MSCA Miscellaneous Criminal Appeal No. 25 of 2005** the Supreme Court of Appeal buttressed the point as follows:

".....the right to bail, which is stipulated in section 42(2)(e) of the Constitution, is not an absolute right; it is subject to the interests of justice. The Court in Lunguzi case expressed this principle in the following words: 'In our view the right to bail section 42(2)(e) now enshrines does not create an absolute right to bail. The section still reserves the discretion to the courts and it makes the position absolutely clear that courts can refuse bail if they are satisfied that the interest of justice so requires.'"

What then constitutes the interests of justice? Lord Justice Mann in the case of **Rex –v –Monrovin [1911] Maun LR p.582** had this to say:

"Interests of justice require that there 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."

The presence of the accused person before a court of law for trial is therefore, the primary consideration as to whether bail should be granted or not. However, this is not a standalone consideration. There are further principles and factors, which the court must also take into consideration. Section 4 of the Bail (Guidelines) Act (Cap 8:05) of the Laws of Malawi provides that principles which the Court must take into account in deciding whether or not bail should be granted must include the following: the likelihood that the accused, if released on bail will attempt to evade his or her trial; 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; 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 in exceptional circumstances, the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

In considering the application of these principles certain factors come into play. The seriousness of the offence and its accompanying punishment if one is found guilty might lead an accused person to evade his/her trial. The more serious the offence, the higher the temptation to evade trial –see **Joseph Mpasu –v The Republic, Misc. Criminal Application No. 38 of 2003.** And that the stronger the case against the accused, the higher the temptation to evade trial –see **Republic –v-Langton, Misc. Criminal Application No. 148 of 2008.** In considering whether the Applicant would interfere with witnesses or try to conceal or destroy evidence, the Court must consider, *inter alia*, the fact that the accused is familiar with the identity of witnesses and their evidence; whether the witnesses have already made statements and agreed to testify; the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated; whether investigations are complete. If on a balance of probabilities the Respondent establishes that the Applicants will indeed, among other things, interfere with the witnesses and the evidence, then bail has to be denied for it wouldn't be in the interests of justice to have the Applicant released on bail.

It is not in contention that the Constitutional right to bail under section 42(2)(e) of the Constitution is not an absolute right. It is subject to the interests of justice. It is also not in dispute that under section118(3) of the Criminal Procedure and Evidence Code this Court has jurisdiction to order the release of **any person** on bail with or without conditions. What is in dispute or in contention is whether the interests of justice would favour releasing the Applicant on bail or not. The Respondent has strongly objected to the release of the Applicant on bail. The Respondent strongly believes that the Applicant might interfere with the witnesses and evidence.

The investigations in this matter are over which means the State has got statements of the victim and any other witnesses. This also means that all the evidence required in this matter is in the hands of the State. It would not be expected therefore that the Applicant, if released on bail, would tamper with such evidence which is in the custody of the State. Furthermore, it is not enough for the Respondent to allege that the Applicant if released on bail is likely going to interfere with the witnesses or evidence. The Respondent must do more than merely alleging. It must be shown, by cogent evidence, that the Applicant knows the witnesses and has the capacity to interfere with them in order to influence their

testimony–Ref. **Frazer Kum'bweza v The Republic, Misc. Criminal Application No. 69 of 2005; Gladys Saigwa v The Republic, Misc. Criminal Application No. 101 of 2005.** However am mindful that each case, just like the application before me, must be decided on its own unique facts, and on its own merits. What is coming out clearly, in this matter, is that the investigations are through, and the Respondent, other than alleging interference with witnesses, has not laid any evidence showing that the Applicant has or attempted to interfere with the witnesses or the evidence. There has not been any evidence adduced, even from a possible witness that the Applicant tried to influence his or her evidence. I am at pains to conclude based on what is before me that the Applicant has interfered with the victim, or will interfere with the witnesses or the evidence.

The Applicant concedes that from the time the shooting occurred, he has been assisting the victim even footing her medical bills. And that this was done well before the charge of attempted murder had been brought against him. He claims it was his moral obligation to assist the victim. The State believes that such assistance is actually the Applicant interfering with their witness the victim. The State ought to have done more to support their assertion. Just alleging is not enough.

I am mindful that the charge of attempted murder which the Applicant is facing is a serious offence attracting a life sentence. However it is a bailable offence. What matters is whether the Applicant will avail himself for trial if granted bail or not. On the evidence before me, I am satisfied that the Respondent has failed to demonstrate that it would be detrimental to the interests of justice to have the Applicant released on bail. It is therefore in the interests of justice that the Applicant be released on bail, after all he is presumed innocent until the contrary is proved. Consequently I order that the Applicant be released on bail on the following conditions:

i. That the Applicant must execute a bond and be bound in the sum of K1,000,000.00 cash

ii. That the Applicant must furnish the Court with two satisfactory sureties, who must be his blood relations, and to be bound in the sums of K500,000.00 each, cash

iii. That the Applicant must surrender his travel documents, if any, with the O/C of Soche Police

iv. That the Applicant must be reporting to the O/C of Soche Police once every fortnight, on Fridays

v. That the Applicant must not leave the District of Blantyre without notifying the O/C of Soche Police .

vi. That the Applicant must have no any contact whatsoever with the victim and any other witnesses, either personally or through any other persons or agents.

vii. That the Applicant must avail himself before this court on the 4th day of September 2020 at 9:00 am for plea and directions.

The sureties to be examined by the Registrar.

MADE in Chambers this 27th day of July 2020 at the Principal Registry, Criminal Division, Blantyre.

S.A. Kalembera

JUDGE