

IN THE HIGH COURT OF MALAWI

CRIMINAL DIVISION

Zomba Registry

Miscellaneous Criminal Cause No. 64 of 2022

(Before Honourable Justice Sankhulani)

BETWEEN

JOHN ISSA.....1ST APPLICANT

ROSE KALIATI.....2ND APPLICANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: HONOURABLE JUSTICE D.H. SANKHULANI

A. Tolani, of Counsel for the Applicants

L. Kulesi, of Counsel for the Respondent

A. Kazambwe, Court Clerk

RULING

Introduction

This ruling follows hearing that was held on the Applicants' application, brought under **Section 42 (2) (e) of the Constitution** and **Sections 118(3) of the Criminal Procedure and Evidence Code**, for an order that they be released from custody on bail pending trial.

Background

The Applicants are both Malawian citizens, and they both hail from Mbamba Village, Traditional Authority Mlumbe, Zomba District.

The 1st Applicant and the 2nd Applicant are presently being kept under the State's custody at Zomba Maximum Prison and Mikuyu Prison, respectively, on allegations of murder.

The Applicants are yet to be committed to the High Court for trial.

The present application is supported by an affidavit and skeleton arguments. There is, also, on record, an affidavit in response to the present application, put in on the Respondent's behalf. We shall, in the course of this ruling, refer to the parties' depositions and arguments, when and where necessary.

The application was heard in the presence of both sides hereto who appeared through Counsel. After the hearing, the matter was adjourned to today's date for ruling. Hence this ruling.

The Parties' Arguments

The Respondent opposes the present application. The State's sole ground for opposing the application is that the Applicants' lives will be in danger, if released. According to the State, there was commotion after the incident which resulted in three houses being burnt down, and the situation was quelled by police who necessarily used tear gas.

The Applicants, on their part, contend that the Respondent's assertions are unsupported by any evidence. It is the contention of the Applicants that the State should have put in a Social Welfare report or an affidavit by the investigating officer showing that the Applicants will not be welcomed back in to the community.

Issues For Determination

The only issue for determination herein is whether or not the interests of justice weigh in favour of granting bail to the Applicants pending their trial.

The Law

Every criminal detainee has got the right to be released from detention, with or without bail, unless the interests of justice require otherwise (Section 42(2)(e) of the Constitution).

Accordingly, all offences are bailable (see *Raphael Kasambara vs. Rep* [2013] MLR 298).

However, the right to bail as guaranteed under Section 42(2)(e) of the Constitution is not absolute, as it is subject to the interests of justice (*DPP vs. Lunguzi* [1995] 2 MLR 632). On an application for bail, the court is to weigh these interests of justice against the applicant's right to personal freedom, particularly prejudice to be occasioned by continued detention (Article 6 of Part II of the Schedule to the *Bail (Guidelines) Act*). The interests of justice are met where court is sure of the availability of applicant for trial, if released on bail (*Joel Mpeketula vs. Rep* [2012] MLR 216).

On an application for bail, the burden of proof is on the State to show that interests of justice weigh against the granting of bail (*Joel Mpeketula vs. Rep, supra*), and the standard thereof is on a balance of probabilities (*DPP vs. Lunguzi, supra*).

Ultimately, the discretion lies with the court whether or not to grant bail (*DPP vs. Lunguzi, supra*).

Determination In The Context Of The Law

As it has already been mentioned, the only issue for determination herein is whether or not the interests of justice weigh in favour of granting bail to the Applicants pending their trial. As we make our determination upon this issue, we shall bear in mind the legal principles outlined above

The State's sole ground for opposing the present application, as it has been mentioned earlier on, is that the Applicants' lives will be in danger, if released. According to the State, as we have already stated, there was commotion after the incident which resulted in three houses being burnt down, and the situation was quelled by police who had to use tear gas.

We, however, find the State's assertion on the safety of the Applicants to be unsubstantiated. As it was rightly contended by the Applicants, through Counsel, the State's assertion that the Applicants' lives will be in danger, if released, should have been substantiated by either an affidavit by an appropriate officer (see *Kingford Madengu vs. The Republic* (Bail No. 38 of 2015, High Court – Principal Registry, unreported) to that effect. The long and short of it all is that the

State should have proffered cogent evidence, in whatever form, substantiating its assertion. In the absence of such evidence, we find the State's assertion that the Applicants' lives will be in danger, if released, which is also its sole ground for opposing the present application, to be unfounded and, therefore, untenable.

As it has already been stated, on an application for bail, the burden of proof is on the State to show that interests of justice weigh against the granting of bail, and the standard thereof is on a balance of probabilities. So, in the matter at hand, the burden of proof was on the State to show that interests of justice weigh against the granting of bail, and the standard thereof was on a balance of probabilities. Now, the State's sole ground for opposing to the present application, namely, that the Applicants' lives will be in danger, if released, having been found above to be untenable, we find that the State/Respondent has not succeeded in discharging, on a balance of probabilities, the burden of proof that was on it to show that interests of justice herein weigh against the granting of bail to the Applicants.

Conclusion

In view of the immediately foregoing finding that the State/Respondent has not succeeded in discharging, on a balance of probabilities, the burden of proof that was on it to show that interests of justice herein weigh against the granting of bail to the Applicants and also taking into account all the circumstances of the Applicants as deduced from their particulars provided in the affidavit in support of the present application, we finally find that interests of justice herein weigh in favour of the granting of bail to the Applicants.

Accordingly, we hereby grant bail to the Applicants herein pending their trial, on the following conditions:

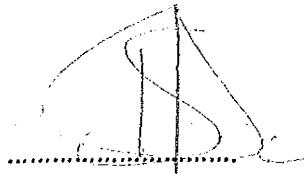
1. Each Applicant shall surrender his travel documents, if any, to the State;
2. Each Applicant shall be bonded in the sum of K50,000.00 cash;
3. Each Applicant shall produce two reliable sureties, related to them by consanguinity and with valid National Identification Documents, and each surety shall be bonded in the sum of K100,000.00 not cash;
4. Each Applicant shall report to the officer-in-charge of the nearest police station once a fortnight on Wednesdays;
5. Each Applicant shall not interfere with State witnesses; and
6. Each Applicant shall attend their trial on all appointed days

As for the examination of proposed sureties, the same shall be conducted before the Assistant Registrar of this Court.

The present application succeeds in its entirety.

We make no order as to costs.

Delivered in Chambers at Zomba this 19th day of July 2022

A handwritten signature in black ink, appearing to be 'D.H. Sankhulani', written over a horizontal dotted line.

D.H. SANKHULANI

JUDGE