

IN THE HIGH COURT OF MALAWI

CRIMINAL DIVISION

Zomba Registry

Miscellaneous Criminal Cause No. 94 of 2022

(Before Honourable Justice Sankhulani)

BETWEEN

KAROTI JAMES.....APPLICANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: HONOURABLE JUSTICE D.H. SANKHULANI

H. Aofi, of Counsel for the Applicant

R. Mkweza, of Counsel for the Respondent

A. Kazambwe, Court Clerk

RULING

Introduction

This ruling follows hearing that was held on the Applicant's application, brought under **Section 42 (2) (e)** of the **Constitution** and **Sections 118(1)** and (Articles 1 and 4 of Part II of the Schedule to the **Bail (Guidelines) Act**), for an order that they be released from custody on bail pending trial.

Background

The Applicant is a Malawian National of full age who hails from Mselema Village, Traditional Authority Mizinga, Machinga District.

The Applicant is presently under the State's custody at Zomba Maximum Prison, on suspicion that he, together with his alleged accomplice, one Ussi Timba, caused the death of a twelve-year-old boy. The said Ussi Timba filed a separate application before this Court under Miscellaneous Criminal Cause No. 93, which application was separately dealt with.

The Applicant is yet to be committed to the High Court for trial.

The present application is supported by an affidavit and skeleton arguments. The Respondent also put in an affidavit and skeleton arguments in response to the present application. 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 objects to the granting of the present application, on three grounds. The Respondent's first ground for objecting to the granting of the present application is that the complainant claims to have been receiving threats from the Applicant's relatives threatening to deal with the complainant if the Applicant is not released. The Respondent's second ground for objecting to the granting of the present application is that the Applicant is a threat to the community, as he killed a defenceless and innocent boy in cold blood. The Respondent's third ground for objecting to the granting of the present application takes the form of an application on its part for an extension of the Applicant's pre-trial custody time, to ensure that it commits the Applicant to the High Court for his trial.

We shall refer to the Applicant's counter-arguments, when and where necessary, in the course of this ruling.

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 Applicant pending his 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

The only issue for determination herein, as it has already been mentioned, is whether or not the interests of justice weigh in favour of granting bail to the Applicant pending his trial.

And as we have already stated, the Respondent objects to the granting of the present application, on three grounds. We shall deal with those three grounds separately, in answering the present issue for determination as mentioned above. It should, here, be noted that, in tackling the present issue for determination, we shall bear in mind the legal principles outlined above.

The Respondent's first ground for objecting to the granting of the present application, as we mentioned earlier on, is that the complainant claims to have been receiving threats from the Applicant's relatives threatening to deal with the complainant if the Applicant is not released. This is according to Paragraph 16 of the State's affidavit in response to the present application. We, however, find this ground to be untenable, for two reasons. Firstly, the assertion of threats

has not been substantiated. As it has rightly been argued by the Applicant, there should have been filed an affidavit sworn by the complainant showing that threats are being made. Unfortunately, we do not have such an affidavit on record, which renders the assertion of threats as unsubstantiated. Secondly and most importantly, the threats are to the effect that the complainant would be dealt with if the Applicant is not released. This, logically, means that if the Applicant is released, then the threats will no longer be there. Therefore, if indeed the complainant is getting such threats as above indicated, then that makes a good case for the granting of bail to the Applicant, and not vice versa. In the premises, we find the Respondent's first ground for objecting to the granting of the present application to be untenable.

The Respondent's second ground for objecting to the granting of the present application, as it has already been mentioned, is that the Applicant is a threat to the community, as he killed a defenceless and innocent boy in cold blood. This is according to Paragraph 4.0 of the State's skeleton arguments in response to the present application. We, however, also have problems with this ground. We furnish our reasons. As it has rightly been argued by the Applicant, the assertion that the Applicant killed the deceased has not been substantiated. As a matter of fact, substantiation of that assertion is a preserve for trial. Now, denying bail on the mere allegation that the Applicant had killed the deceased would be wrong, as that would run counter to the presumption of innocence that presently operates in the Applicant's favour, by virtue of **Section 42 (2) (f)(iii) of the Constitution**. For these reasons, we find the Respondent's second ground for objecting to the granting of the present application to be untenable.

The Respondent's third ground for objecting to the granting of the present application, as we already mentioned, takes the form of an application on its part for an extension of the Applicant's pre-trial custody time, to ensure that it commits the Applicant to the High Court for his trial. This, again, is according to Paragraph 4.0 of the State's skeleton arguments in response to the present application. But the actual application was made orally by Counsel for the Respondent in the course of responding to the present application. Put simply, the State seeks an extension of the Applicant's pre-trial custody time simply because it wants to take advantage of the extension to commit the Applicant to the High Court for his trial. We are, however, unable to entertain the Respondent's application for an extension of the Applicant's pre-trial custody time. The reason is simple. No law was cited or invoked under which the Respondent's application for an extension of the Applicant's pre-trial custody time was brought before this Court. In view of that omission, we opine and find that the application was improperly brought before this Court and ought, on that score alone, to be dismissed. Accordingly, the Respondent's application for an extension of the Applicant's pre-trial custody time is hereby dismissed for having been improperly brought before this Court. We must put it on record that even if we had found the application to have properly been brought, we would still have found the Respondent's third ground for objecting to the granting of the present application to be untenable, for three reasons. Firstly, in our most-considered opinion, the fact that the Applicant

is yet to be committed to the High Court is not a good ground for denying him bail. Honestly, we are not aware of any law to the contrary. Secondly, in our view, the present position whereby the Applicant is yet to be committed to the High Court is of the State's own making. And the State cannot be allowed to invoke its own slackness as a basis for denying the Applicant bail. Thirdly, the right to be released on bail is available to a criminal detainee at any stage of the criminal justice process before conviction (Section 42 (2) (e) of the Constitution as read with Article 1 of Part II of the Schedule to the Bail (Guidelines) Act). It, therefore, follows that the right to be released on bail is available to a criminal detainee even before he is committed to the High Court for his trial, for offences triable by the High Court. Accordingly, the Applicant herein has got the right to be released on bail, subject to the interests of justice, even though he is yet to be committed to the High Court. So, for these three reasons, even if we had found the application to have been properly brought, we would still have found the Respondent's third ground for objecting to the granting of the present application to be untenable. On the foregoing, we find the Respondent's third ground for objecting to the granting of the present application to be 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. Therefore, 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, all the Respondent's three grounds for objecting to the granting of the present application having been found above to be untenable, we ultimately find that the 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 Applicant.

Conclusion

In view of the immediately foregoing finding that the 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 Applicant and also taking into account all the circumstances of the Applicant as deduced from his 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 Applicant.

Accordingly, we hereby grant bail to the Applicant herein pending his trial, on the following conditions:

1. The Applicant shall surrender his travel documents, if any, to the State;

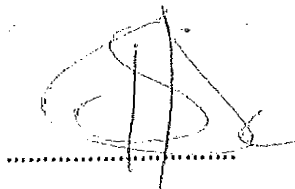
2. The Applicant shall be bonded in the sum of K50,000.00 cash;
3. The Applicant shall produce two reliable sureties, related to him by consanguinity and with valid National Identification Documents, and each surety shall be bonded in the sum of K100,000.00 not cash;
4. The Applicant shall report to the officer-in-charge of the nearest police station once a fortnight on Wednesdays;
5. The Applicant shall not interfere with State witnesses; and
6. The Applicant shall attend his 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, consisting of a large, stylized 'S' shape with a vertical line through it, and a horizontal line at the bottom.

D.H. SANKHULANI

JUDGE