REPUBLIC OF MALAWI

IN THE SENIOR RESIDENT MAGISTRATE COURT SITTING AT LILONGWE

CRIMINAL CASE NUMBER 717 OF 2024

BETWEEN

THE STATE

AND

KONDWANI CHIMBILIMA GONDWE

Coram: Michongwe, Principal Resident Magistrate

Mangani, for the State

Mchizi for the Accused

Itai, Clerk/Official Interpreter

RULING

---

1. The charges

The accused person stands before the court charged with two counts. The first count is "prohibition of offensive communication contrary to Section 87 of the Electronic Transaction and Cyber Security Act, 2016."

The State has alleged that:

> Kondwani Chimbilima Gondwe on or about the 11th June of 2024 in the Republic of Malawi willfully recorded and published an audio in media platforms in which he claimed, *inter alia,* that His Excellency the President of the Republic of Malawi Dr. Lazarus McCarthy Chakwera lied to Malawians about the plane crash that caused the demise of the Former Vice President of Malawi Dr. Saulos Klaus Chilima and demanded that the

President should resign, or he will be forced to resign, which communication disturbed the peace of some Malawians

Section 87 of the Electronic Transaction and Cyber Security Act, 2016 provides as follows:

> Any person who willfully and repeatedly uses electronic communication to disturb or attempts to disturb the peace, quietness or right of privacy of any person with no purpose of legitimate communication whether or not a conversation ensues, commits a misdemeanour and shall, upon conviction, be liable to a fine of K1,000,000 and to imprisonment for twelve months.

The second count is "publication of false news likely to cause fear and alarm to the public contrary to section 60(1) of the Penal Code."

The State has alleged that:

> Kondwani Chimbilima Gondwe on or about the 11th June of 2024 in the Republic of Malawi willfully recorded and published an audio in media platforms in which he claimed, *inter alia*, that His Excellency the President of the Republic of Malawi Dr. Lazarus McCarthy Chakwera lied to Malawians about the plane crash that caused the demise of the Former Vice President of Malawi Dr. Saulos Klaus Chilima and demanded that the President should resign, , or he will be forced to resign, which publication was likely to cause fear and alarm to the public.

Section 60(1) of the Penal Code provides as follows:

> Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace shall be guilty of a misdemeanor.

2. The applications

The accused person was brought before the court for purposes of plea taking. The court administered it. Later, the State prayed for further incarceration of the accused person on the pretext that the investigations are not yet over as some potential witnesses are yet to be recorded statements. A two-day-adjournment was sought for the State to finalize the investigations.

In response, counsel for the accused person stated that the accused person has no issues with the adjournment sought but had an application for the release of the accused person with or without bail in accordance to section (42)(2)(e) of the Constitution as well as section 118 of the Criminal Procedure and Evidence Code.

In responding to the application, the State argued that the investigations are still underway and was objecting to the application. The State said that the subject matter of the case is an audio that was posted on a Livingstonia forum and the police has not done investigation to the members of the forum. Further, the State argued that if released, the accused person can influence the members of the forum and likely he may intimidate them. The State said that they had brought the accused person within the required 48 hours. Those were the reasons for the objection to the application.

3. Reminders on the law

The supremacy of the Constitution

It is trite that the Constitution of Malawi is the supreme law in Malawi. Section 199 of the Constitution provides that:

> This Constitution shall have the status as supreme law and there shall be no legal or political authority save as is provided by or under this Constitution.

Emphasizing on the supremacy of the Constitution, section 10(1) of the Constitution provides that:

> In the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority.

Further, section 5 of the Constitution stipulates that:

> Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.

In addition, section 88(1) of the Constitution reminds the executive arm of government on the supremacy of the Constitution. It provides that:

> The President shall be responsible for the observance of the provisions of this Constitution by the executive and shall, as head of State, defend and uphold the Constitution as the supreme law of the Republic.

Lastly, section 4 of the Constitution of Malawi dictates the protection of the people of Malawi and the binding powers it has over the executive, legislature and judicial organs of the government. It states that:

> This Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it.

It is also worth a reminder on section 153(3) of the Constitution. The provision states that:

> In the exercise of their functions, members of the Malawi Police Service shall be subject to the direction of the courts and shall be bound by the orders of such courts.

Fair trial

The Constitution, the supreme law, provides for the right to fair trial to persons who have been arrested or detained. Quick reminders on the law are found under section 42 of the Constitution of Malawi.

Section 42(2)(b) 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, as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released.

Section 42(2)(e) 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.

Section 42(2)(f)(i) states 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 public trial before an independent and impartial court of law within a reasonable time after having been charged.

Section 42(2)(f)(iii) 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 presumed innocent…

Reading the whole section 42 of the Constitution will remind the State organs the rights of the accused persons for the purposes of fair trial and the avoidance of arbitrary use of its powers.

Release from detention

As regard to section 42(2)(e) of the Constitution, the reminder comes from the directions of the higher courts that binds the lower courts and other State organs. By default, and as a matter of right, the accused persons have to be released from detention unless the interest of justice requires not to do so. The burden to prove this rests with the State and not the accused person on a balance of probabilities. This is supported by other written laws like section 118 of the Criminal procedure and Evidence Code.

The Bail Guidelines Act also is worth a reminder on the principles guiding the release of the accused person from detention. State agencies must be reading such laws.

Section 3 provides that:

> In considering whether to grant or refuse bail, a police officer or a court, as the case may be, shall be guided by the principles, factors and other matters, constituting Guidelines on Bail, specified in the Schedule.

The police are guided by Part I of the Bail Guidelines Act on what to do on the issue of police bail.

Section 2 of Part I provides as follows:

> Where a person has been arrested and is then charged at the police station, the most Senior Police Officer must decide whether to keep him or her in custody till he or she can be brought before the court or to release him or her on bail.

Section 5 provides for the principles to follow that borders of the 'likelihood' and not as a matter of fact. Section 6 provides the factors to look into when granting or refusing the release. This is to the most senior police officer at the station.

The Courts are guided by Part II of the Bail Guidelines Act when dealing with the applications to release the accused person with or without bail. Section 1 of Part II of the Act provides as follows:

> A person arrested for, or accused of, the alleged commission of an offence is entitled to be released, with or without bail, at any stage preceding his or her conviction in respect of the offence, unless the court finds that it is in the interests of justice that he or she be detained in custody.

The courts are guided by the principles and factors outlined under section 4 of Part II of the Act and also boarders on the 'likelihood' and not as a matter of fact. The "likelihood" requires the State to satisfy the court whether it is likely that the accused person may do what the Act presupposes. This requires some facts to substantiate the likelihood.

There are numerous case laws worth reading on the right to be released from detention with or without bail. Worth noting is the supreme court settled law in Kettie Kamwangala v R (Miscellaneous Criminal Appeal No. 6 of 2013). Just a reminder to the State on the argument that investigations are not yet over. Section 4(b)(iv) of Bail Guidelines Act provides:

> The principles which the court should take into account in deciding whether or not bail should be granted include 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; and in considering this principle the court may, where applicable, take into account whether the investigation against the accused has already been completed.

The Supreme Court, that we are all bound to its decision, explained and interpreted this principle in the clearest way possible. It only needs both the State and the court to implement and enforce the law as interpreted. The Hon. Justice Chikopa JA had this to say and direct in that Kamwangala case:

> Much was said about incomplete police investigations. Whether they can be the basis for a denial of bail. Speaking for ourselves we believe that law enforcement should only effect

> an arrest when they have evidence of more than mere suspicion of criminality. We also believe that such evidence should only be the product of investigations. Where there is no investigation there cannot, we believe, be any evidence. Where there is no evidence it would seem only natural that there should be no arrests. We therefore find it rather perverse that law enforcement should arrest with a view to investigate. Or that they should object to a release on bail merely because they have not completed investigations. It calls into question the very acts of arresting and detaining a person. It also raises the question whether or not law enforcement will benefit from their own incompetence. Accordingly, in our view the courts should be slow, very slow to refuse to release a detainee just because law enforcement has not completed investigations. Proceeding otherwise would lead to abuse of the right to liberty. People would be detained or continue to be in detention on the basis of pending or incomplete investigations when there were in fact none. Law enforcement would be tempted to slow down investigations with a view to keeping accused persons in custody longer. We would therefore rather the law were interpreted in such a way that arrests and detention followed investigations. That way liberty would, in appropriate cases, then be withheld not because investigations were not complete but because they would not be properly completed with the accused at liberty. Or that there would be interference with witnesses/investigations.

This sums it all in the clear language that any reasonable law enforcer will do the needful and respect the supremacy of the constitution. This is the direction of the court to the members of the Malawi Police Services in rendering their services to the citizenry.

48-hour-rule

On the 48-hour-rule, section 42(2)(b) of the Constitution is just clear. It is a right that all States organs have to respect. Justice Mwaungulu, as he was then, in the case of R v Leveleve (Miscellaneous Criminal Application 195 of 2002) stated as follows:

> The right under section 42 (2) (b) of the Constitution should be seen as more than a right. Like most rights, it is an ideal. In my judgment it is also a standard, a measure of the efficiency of our criminal justice system. For separation of powers and removal of arbitrariness in the criminal process, the forty-eight hour right ensures prompt judicial

control and check on executive actions affecting citizen's rights. To the citizen, the forty-eight hour right affords the citizen a prompt opportunity to assert and sample rights the Constitution creates for the citizen and test the reasonableness of the state's deprival of those rights. The framers set forty-eight hours as the efficiency standard for our criminal justice system to bring the citizen under judicial surveillance. In my judgment there are no operational problems.

If there are operational problems, they point to the inefficiency of the criminal justice system and a compromise of the standard and efficiency level the section creates. I see no difficulties in state organs implementing the forty-eight hour right. This Court will take judicial notice that no police station in the Republic is forty-eight hours away from a court of law. Even if arrested on the furthest part in the north, Chitipa, formerly Fort Hill, in forty-eight hours, the state would bring the prisoner to the southern end, Nsanje, formerly Port Herald. It matters less that the matter is one that only the High Court can try. There are four branches of the High Court, one in each judicial region. More importantly, section 42 (2) (b) of the Constitution requires the state organs bring the citizen to an impartial and independent court of law. Magistrate courts are such courts. Under the Criminal Procedure and Evidence Code, they have jurisdiction over preliminary inquiries in matters that should be tried in the High Court unless the Director of Public Prosecution issues a certificate under the Code that the matter is a proper and fit one to be tried in the High Court. Compliance with the forty-eight-hour rule can be done at the minimum of cost to the state system.

State organs cannot, however, avoid constitutional duties and responsibilities under the section because of administrative or financial difficulties. The weight a democratic constitution attaches to the citizen's rights should, in my judgment, be matched with prioritizing and desire to attain efficiency levels that uphold and promote rights. Any other approach results in violation of rights.

Whenever the State is not ready with the evidence, or seeks for further period of time for investigations, Section 160A-H provides for a remedy. The State has to apply for the pre-trial

custody time limit before the court with evidence, be it from the investigator or anyone and not by the word of mouth by the prosecutor which will deny the opportunity to cross examine the one asserting.

It must be repeated that section 153(3) of the Constitution demands that in the exercise of their functions, members of the Malawi Police Service shall be subject to the direction of the courts and shall be bound by the orders of such courts. The orders must come from the court and not any orders from above or any other authority. All branches of the Malawi Police Service have to read and know these basics of the law when providing the service to the citizenry. Reading of the law will help not only in avoiding the violation of the law, but also the effective enforcement of the law as law enforcers.

It is also worth a reminder that release on bail is not the end of the case. Most of the criminal cases are piling up in courts just because of the misconception that when one has been released on bail the case ends there. When bail has been granted, delaying tactics becomes the order of the day by the accused persons or their representation. Cases must come to its logical conclusion. Criminal Justice system is a system as it is so properly called. All involved have to do their part for the system to operate and function. When one involved does not perform, the system becomes disturbed. When such delays are occasioned by the accused person, the State is at liberty to make an application to revoke the bail so that the accused person is available before the court and for trial. If the delays are occasioned by the State, the accused person can apply for the discharge for won't of prosecution under section 247 of the Criminal Procedure and Evidence Code or any other written law.

Reading the law by law enforcers will help in enforcing the law at all levels of the State and its agencies. It will help to build competencies in the criminal justice system. Enforcing the law requires knowing the law that is to be enforced.

Procedure on arrest of a person

The final reminder in the ruling is section 104 of the Criminal Procedure and Evidence Code. It provides that:

> When a warrant of arrest is executed, the person arrested shall unless the court which issued the warrant is within thirty kilometers of the place of arrest, or is nearer than any other subordinate court, or unless security is taken under section 97, be taken before the subordinate court nearest to the place of arrest.

The law requires that anyone arrested after obtaining a warrant of arrest, he or she must be taken to the nearest court even if that is not the court that issued the warrant. If the court that issued the warrant is within 30 kilometers, the accused be taken to that court that issued the warrant. The determining factor is "the nearest court". The magistrate presiding over such subordinate court shall, if the person arrested appears to be the person intended by the court which issued the warrant, direct his removal in custody to such court. If the person is ready and willing to give bail to the satisfaction of such magistrate, the magistrate shall take such bail or security, as the case may be, and shall forward the bond to the court which issued the warrant.

These were just simple reminders, lest, we forget. The State has to take the reminders seriously at all branches and levels.

4. The application at hand

On the application to release the accused person from detention, I grant it. There has been no evidence that the investigations are still on going, late alone, the same cannot stand alone. There is no evidence that the investigations cannot continue or be carried out properly if the accused person is released. I therefore, release the accused person on bail.

Any aggrieved party to this ruling has a right to appeal before the High Court.

Made in Open Court, this 26th June 2024

RHODRICK STEPHEN MICHONGWE
PRINCIPAL RESIDENT MAGISTRATE