JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEUOS CRIMINAL APPLICATION NO. 20 OF 2008

IN THE MATTER OF S42(2)(E) OF THE CONSTITUTION

AND
IN THE MATTER OF S118 OF THE CRIMINAL PROCEDURE AND

EVIDENCE CODE

AND IN THE MATTER OF S10 OF THE BAIL
(GUIDELINES) ACT 2000

BETWEEN:

JAHID OSMAN IBRAHIM …….APPLICANT

- AND -

THE REPUBLIC ……....RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA
Mr G. Kaliwo, of Counsel for the applicant
Dame S Mapemba, Senior State Advocate, for the State
Mrs P. Mangison – Official Interpreter

R U L I N G

Manyungwa, J

INTRODUCTION:

This is an application for bail made by Mr Gustave Kaliwo, of Counsel, on behalf of the applicant, one Jahid Osman Ibrahim. The State was represented at the hearing by Dame Mapemba, Senior State Advocate. The application is made by under Section 42(2)(e) of the Constitution as read with Section 118 of the Criminal Procedure and Evidence Code[1]. There is an affidavit sworn in support of the application by Martha Kaukonde, of Counsel in the firm of Messrs Nampota & Company, on behalf of Jahid Osman Ibrahim to whom I shall hereinafter refer to as the applicant. There is also filed together with the applicant's affidavit skeleton arguments and a supplementary affidavit sworn by Shaheed Osman. Both affidavits and the skeleton arguments were fully adopted by Counsel for the applicant. The State through Dame Stella Mapemba, swore an affidavit in opposition, which said affidavit was also fully adopted by the State.

THE APPLICANT'S CASE:

In her affidavit in support of the summons for bail, Martha Kaukonde, of Counsel, deposes that the applicant was arrested by officers from Limbe Police on the morning of Friday the 12th September, 2008 and was incarcerated at Limbe Police Station from Friday to Monday 15th September 2008 when he was moved to Ntcheu Police Station. The deponent further states that by reason of the said incarceration, the applicant is unable to swear an affidavit as the Police have deliberately moved him from Blantyre to Ntcheu. The deponent further states that the applicant aged 29, and hails from Kaleso Village, Traditional Authority Mbenjere in Nsanje District was arrested on an allegation that he received stolen property namely, a motor vehicle that is reasonably suspected to have been stolen, and that the said vehicle came into the possession of the applicant on Thursday the 11th day of August, 2008 from a friend who got it from one Kaka Ali, a Blantyre resident who bought it from a certain person who is suspected to have stolen the said motor vehicle. It is further stated that the person who is alleged to have stolen the motor vehicle and the said Kaka Ali are not in Police custody.

The deponent further deposes that the vehicle in issue was found in the possession of the applicant at his home in Blantyre as the said Kaka Ali had asked the applicant to find a buyer for him and that despite the fact that the alleged crime charged against the applicant is alleged to have occurred in Blantyre, the police decided to move the applicant to Ntcheu Prison on an allegation of murder. The deponent further states that she is informed that it

[1] Criminal Procedure and Evidence Code, Chapter 8:01 of the Laws of Malawi

is alleged by the police that an offence or a crime of armed robbery was committed in getting the vehicle from its owner and that the alleged robbery resulted in the death of a person, the deceased, hence the charge of murder against the applicant in the absence of actual perpetrators of the alleged crime. Miss Kaukonde contends in her affidavit that the applicant was not aware of the said robbery and that the police are aware that he was not at the scene of the alleged robbery and charging him with murder and keeping him in custody for the said allegation is tantamount to collective punishment. It is further stated that the applicant is a responsible son who assists his father a Mr Yakub Osman to run his transport business and that he also drives a truck. Miss Kaukonde further gave the grounds for which the applicant applies for bail as follows:-

i. That there is no evidence whatsoever linking the applicant to the robbery or murder of the owner of the vehicle as the same occurred in Ntcheu whilst the applicant was at all material times in Blantyre and only got to know of the vehicle when he was asked by his friend to find a buyer for the same.
ii. That the applicant is a responsible citizen of Malawi with strong family ties and that he can not abscond bail if so granted by this court.
iii. That the police know the perpetrators who might have committed the crime but since they have not arrested them yet, they want to use the applicant's incarceration to get the real suspects.
iv. That the applicant stays in Blantyre and is not aware of the crime that is said to have been committed in Ntcheu and cannot interfere with any possible state witnesses.
v. There is nothing in the interest of justice requiring continued detention of the applicant as his release cannot in any way jeopardise his trial nor is he a threat to the society at large as this is the first time to answer such a serious criminal charge.

The deponent further deposes that the applicant first applied for bail on 22nd September 2008 and that the same was denied by my learned brother Chipeta, J on the reason that the State had neither a reasonable time to conduct and conclude its investigations nor had it been given sufficient time to meaningfully respond to the applicant's application. It is further stated that it is now 25 days since the applicant's incarceration, and that the applicant seeks to make a fresh application for bail as the circumstances since the earlier application have changed in that reasonable time has passed

in favour to the State, and that the applicant therefore humbly prays for bail with or without conditions.

And in his supplementary affidavit, Shaheed Osman deposes that on the 18th day of September 2008 he was arraigned before the Ntcheu Magistrate Court and charged with the offence of murder to which he pleaded not guilty. The deponent states that he is a ***bona fide*** Malawian and partner in his father's Mr Yakub Osman's transport business, and that his father is a public figure being former Member of Parliament for Blantyre East Constituency and that the said Mr Yakub Osman is ready to be surety to the applicant's bail bond if the applicant were to be admitted to bail. The deponent further states that he has close ties to the country and community and that he has no family outside the country where he can flee to, and that he undertakes to present himself for the trial. The applicant further states in his affidavit that whilst going through interrogations by the police it became clear that the police were aware of the identity of the person who killed the deceased in issue and that the said police are only holding the applicant in order for him to supply them with information regarding the whereabouts of the real culprit in the case. It is further stated by the applicant that the murder or offence in question was committed before the 4th and 8th September, 2008, which is a period when the applicant was away to Chikwawa on a business trip, where he went on 3rd September, 2003. The applicant further states that the motor vehicle in issue found itself into his father's compound through the applicant's friends namely Abdullah and Bule who had called him earlier and told him that they had a vehicle for sale. The phone call was made on 10th September, 2008, and the car arrived on 11th September 2008 and that when the police came to the applicant's father's home, they found the car whereupon they arrested the applicant. The applicant therefore contends that the interests of justice weighs heavily in the applicant's favour as there is no way the applicant could flee from a trial whose issue does not concern him, and so the applicant humbly prays for bail.

THE RESPONDENT'S CASE:

In her affidavit in opposition Dame Stella Mapemba, of Counsel, deposed that the matters she was deposing to were obtained from the station prosecution officer, a Mr Sikumbiri based at Ntcheu Police. The deponent stated that the deceased, only referred to as Joachim by the police, was a Mozambican national. The deponent states further that the deceased accompanied by one Mike Banda, a Malawian national came to Malawi to purchase motor vehicle spare parts, and that while in the country, the said

Mike Banda conspired with Kaka Ali to kill the Mozambican so that they could steal his Toyota Hilux Twin Cab valued at over MK9, 000,000.00, money and other personal effects. Dame Mapemba further deposes that the two eventually killed the Mozambican national, and dumped his body on the middle of the road so that a vehicle should ran over the said body so as to mislead people into believing that the deceased was run over by a passing vehicle. However, unfortunately no vehicle ran over the said body.

It is further stated that subsequently the two suspects drove the vehicle to the applicant's house where the police found it. The police then arrested the applicant, Frank Tambala and Abdul Ibrahim in connection with both the murder of Joachim, the deceased and the theft of the car. The three suspects were kept at Limbe Police Station for three days before being transferred to Ntcheu Prison for ease of investigation. Dame Mapemba further states that the two suspects however namely Mike Banda and Kaka Ali are still at large. It is further stated that the applicant first applied for bail on 22nd September, 2008 but that bail was denied by my brother judge, Chipeta, J on the ground that the State had not been given reasonable time to conclude its investigations, and that after the said ruling by Chipeta J, the State has not rested in as far as investigations on this matter are concerned. Dame Mapemba, further deposes that as a matter of fact, the case has since been referred to Interpool Zambia, who informed the State that the two suspects were in Zambia but that they have now fled to Namibia. The matter is currently being handled by Namibian Police, who are yet to brief the Malawi Police, and the State Advocate's chambers on their findings. It is therefore contended on behalf of the State that in the premises, it is clear that the State is still investigating the matter and as such releasing the applicant at this crucial time will be detrimental to the efforts the State has put to have the truth of the matter known. Further, it is contended that the behaviour of the two suspects who are at large is giving the State concerns as to the availability of the applicant during trial once he is released on bail. In these premises therefore, the State objects to the granting of bail to the applicant.

SUBMISSIONS:

Before I venture into my analysis of the law, I wish to record the court's gratitude to both Counsel for the applicant and Counsel for the State on their lucid and well researched submissions which were illuminating. Due to reasons of brevity however, I may not be able to recite all their submissions, suffice to say, where necessary, I shall have recourse them.

ISSUE(S) FOR DETERMINATION:

The main issue for determination of the court in this matter is whether the applicant should be granted bail as prayed for by Mr Kaliwo on behalf of the applicant, or whether bail should be refused as prayed for by Dame Mapemba.

THE LAW:

The relevant law governing the issue of bail in the instant case is Section (42) (e) of the Constitutions and Section 118 of the Criminal Procedure and Evidence Code. Section 42(2)(e) of the Constitution provides:

> S42(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 a detained person, have the right:
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> …
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> (e) to be released from detention with or without bail unless the interests of justice require otherwise".

The right to bail has always been available to an accused person, and that all that the above provision has done is to give it a Constitutional force. The right to bail has long been recognised as is provided for in the Criminal Procedure and Evidence Code, a 1968 Act. Section 118 of the Code, is in part, it the following terms:

> S118(1) "When any person, other that a person accused of an offence punishable with death, is arrested or detained without warrant by a police officer, or appears or is brought before a court and is prepared at any time while in custody of such police officer or at any stage of the proceedings before such court to give bail, such person may be released on bail by such police officer or such court, as the case may be, on bond with or without sureties.
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> …
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> (3) 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 or any bail required by a subordinate court or police officer be reduced or varied".

Further, Section 1 of Part II of the Bail Guidelines Act[1] provides:

> S1 "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 interest of justice that he or she be detained in custody".

Clearly therefore the position at law from both the reading of Section 42(2)(2) of the constitution and Section 118 of the Criminal Procedure and Evidence Code, is that the High Court has power to grant bail to any detained person who is alleged to have committed any offence subject only to the interests of justice. In the case of ***Fadweck Mvahe V Rep***[2] their Lordships, Unyolo CJ, Mtegha JA, Kalaile JA. Mtambo JA and Tembo JA stated at page 7 of their judgement

> "Just to recapitulate, we have indicated that it is common ground that High Court has power to release on bail a person accused of any offence including murder. We have indicated also that it is common case that the right to bail stipulated is Section 42(2)(e) of the Constitution is not an absolute right; it is subject to the interest of justice".

See also: ***Mc William Lunguzi V The Republic***[3] and ***Christos Demetrios Yiannakis V The Republic***[4]. It must also be understood that at common law, the position was that the High court had discretion to grant bail in capital offences. It was decided in England in as early as 1625 in the cases of ***Herbert V Vaugham***[5], ***Witham V Dulton***[6] and ***Burney's Case***[7]. In the case of ***Witham V Dulton*** [supra], the court said

> "The court may bail for High Treason, but it is a special favour and not done without the consent of the Attorney General, and they likewise may bail for murder, but it is seldom done, and never without special reason".

In my considered judgement therefore, when Section 42(2)(e) of the Constitution is read together with Section 118 of the Criminal Procedure and

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[1] Bail Guidelines Act, 2000
[2] ***Fadweck Mvahe V Rep*** MSCA Criminal Appeal No. 25 of 2005
[3] ***McWilliam Lunguzi V The Republic*** MSCA 1995 1 MLR 632
[4] ***Christos Demetrios Yiannakis V Rep*** 1995 2MLR, 505
[5] ***Herbert V Vaugham*** (1625) Lat 12
[6] ***Witham V Dulton*** (1689) Comb 111
[7] ***Burney's Case*** (1695) 5 Mod. Rep 323

Evidence Code, a detained or an arrested person is entitled as a matter of right to be released with or without bail unless the interests of justice require otherwise.

The paramount consideration that a court takes into account as to whether it is going to remand an accused or release him or her on bail is that he or she should stand trial. In a Canadian case of ***Rex V Hawken***[1] Chief Justice Faris, SC said:

> "The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed to be innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted when the judge is satisfied that bail will ensure the accused appearing for his trial".

In the case of ***Amon Zgambo V Rep***[2], the Supreme Court had this to say on the point.

> "An accused is presumed by the law to be innocent until his or her guilt has been proved in a court of law and bail should not ordinarily be withheld from him as a form of punishment. The court should therefore grant bail to an accused unless this is likely to prejudice the interests of justice".

The primary consideration therefore when the court is determining whether to grant bail or not is whether it is likely that an accused, if released on bail would avail himself or herself for his or her trial. As to what is meant by the expression "Interests of justice" this was answered in the case of ***Rex V Monrovin***[3] when Lord Justice Mann said:

> "Interest 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 learned authors of ***Archbold, Criminal Pleadings and Practice***[4] they State as follows:-

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[1] ***Rex V Hawken*** [1944] 2 DLR, 116 119 – 120
[2] ***Amon Zgambo V Rep*** MSCA Criminal Appeal No. 11 of 1998 (unreported)
[3] ***Rex V Monrovin*** (1911) Mann L R page 582
[4] Archbold, Criminal Pleadings and Practice, 1998, Sweet and Maxwell

> "The proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear for trial to take his trial".

This is the principle that courts consider when deciding whether to grant bail or not. In the case of ***Amon Zgambo V Rep*** [supra] the Supreme Court stated:

> "The requirements of bail are merely to secure the attendant of the accused at his trial and the test is whether it is probable that the accused will appear to take his or her trial. 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.
> The court will take into account this issue of whether there reasonable grounds for believing that the accused if released on bail will tamper with witnesses or interfere with the relevant evidence or otherwise obstruct the course of justice. The determination of this issue will involve a consideration of the other related issues such whether the accused is aware of the identity of the witnesses and the nature of their evidence, whether the witness have already made their statements to the police or whether the case is still under investigation, whether it is probable that they may be influenced or intimidated by him or her. The court will also consider whether there is reasonable likehood that if released on bail, the accused will commit further offences".

Of course it is for the State to show why it is the interest of justice that an accused should not be admitted to bail. In the instant case the applicant was arrested by Limbe Police on 15th September, 2008 on allegations that he received a motor vehicle that is reasonably suspected to have been stolen. As a matter of fact, the police found the said motor, a Toyota Hilux twin cab at the applicant's father's compound. The story of the applicant is that the motor vehicle in question came to him on Thursday, 11th August, 2008 through a friend, who got it from one Kaka Ali, a Blantyre resident, who bought it from a certain person who is suspected to have stolen the motor vehicle. The applicant was then asked by the said Kaka Ali to find a buyer for him. It should be stated that the owner of the said vehicle died in circumstances that point to a robbery, hence the vehicle being offered for sale. The applicant impresses upon the court that he did not take part in the

alleged robbery that allegedly resulted in the death of the deceased, and the robbery of the motor vehicle in question. On the other hand, the State has pleaded with the court not to admit the applicant to bail as investigations are in progress. In fact a charge of murder has already been preferred to the applicant.

On the 22nd September, 2008, the applicant applied for bail, and Chipeta refused to grant the applicant bail, in ***Miscellaneous Criminal Application No. 201 of 2008.*** This is what the learned judge said at page2

> "There are offences of varying degrees and gravity in Criminal Law. For theft of a loaf of bread or for killing a neighbour's chicken, I would not expect the state to toil for days on end with investigation. For the killing of a human being I would not be so insensitive as to treat it as an ordinary crime, that can be investigated as easily. I tend in being arrested for being found with a vehicle that was allegedly stolen in a scenario that resulted in the death of a person and asking for bail only ten days after the arrest, and after allowing the State only two days within which it could have reacted, to the application, the applicant is being naïve about the absence of evidence from the State…The State is entitled to reasonable time to conduct investigations and in squeezing his application for bail within ten days of his being arrested for possessing a motor vehicle that is linked to a homicide, appears to me the applicant has tried to ensure that the respondent would have nothing to offer at the hearing so that only story can carry the day.
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> Contrary to the way the applicant argued his application, bail remains in the discretion of the court. A court of law cannot grant bail to any, applicant as a matter of course".

See also: ***Amon Zgambo V Republic***[supra].

I must say that I concur fully with the observations made by my brother judge. In fact, although a court of law is at this stage not so much concerned with evidence, as that is for the trial court, it is clear in my mind, considering what is before me that perhaps this application is premature. The applicants story sounds so good to be true, and until investigations are completed the court would be slow to play ball. It is not disputed that investigations are still going on, and that those investigation have spilled over to not only the neighbouring Zambia, but have gone to as far as Namibia. It would in my

considered opinion be unfair to expect that such investigations would be concluded within a period of less than a month, which is a period the applicant has been in custody. As much as I am aware that detention should not be used as a form of pre – trial punishment but in my view one month for the State to investigate a crime, whose investigations have extended to foreign countries is a period, in my view, too short.

CONCLUSION:

In these premises, and on the basis of the foregoing, I decline to exercise my discretion in favour of the applicant, and consequently I refuse to grant the applicant bail.

Pronounced in Chambers this 16th day of October, 2008.

Joselph S Manyungwa
JUDGE