JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEUOS CRIMINAL APPLICATION NO. 167 OF 2008
IN THE MATTER OF SECTION (42)(2)(e) OF THE CONSTITUTION
AND
IN THE MATTER OF SECTION 118 OF THE CRIMINAL PROCEDURE AND EVIDENCE CODE

BETWEEN:

EDWARD KUFA ……..PLAINTIFF

- AND -

THE REPUBLIC ……...DEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA
Mr Mapemba, of Counsel for the applicant
Mr Supede, Senior state Advocate, for the State
Mrs Mangisoni – Official Interpreter

R U L I N G

Manyungwa, J

INTRODUCTION:

This is an application for bail made by Mr Mapemba, of Counsel, on behalf of the applicant namely, one Edward Kufa. The application is made pursuant to the provisions of Section 42(2)(e) of the Constitution as read with Section 118 of the Criminal and Evidence Code[1]. There is an affidavit in support of the application and skeleton arguments which were fully adopted by Counsel for the applicant. The State was represented at the

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

hearing by Mr Noel Supedi, Senior State Advocate, who also filed an affidavit in opposition which he fully adopted.

THE APPLICANTS CASE:

In his affidavit in support, of the application the sworn by Madalitso M'meta, of Counsel, it is deposed that the applicant was arrested on 18th July, 2008 by officers of Soche Police Station, on suspicion of having caused the death of his pregnant girl – friend namely Ulemu Kanike, the deceased herein with whom he was cohabiting. It is further deposed that the applicant was then taken to the High Court on 21st July, 2008 and remanded to Chichiri Prison pending his trial and this court on 25th July, 2008 declined to grant bail to the applicant on the grounds that the occurrence of the crime was recent and further that the safety of the applicant would most likely have been compromised. The court further ordered that if 60 days elapsed before the trial of the applicant, then he would be at liberty to re – apply for bail. It is further contended on behalf of the applicant that the interest of justice militate in favour of the applicant on account of the following grounds:

a. 60 days have since elapsed and that no trial or indication of trial has taken place.
b. The applicant has never been in conflict with the law and it is likely that he will not offend anyone whilst on bail.
c. It is unlikely that he would abscond bail as he is ready to furnish the court with security for his release and for his abiding by the bail conditions.
d. There is no indication that the deceased's relations have a history of taking the law into their hands.
e. A considerable time has passed since the said incident, hence it is unlikely that he would face uncontrollable vengeance, if any, from the deceased's relations.

Further, the deponent states that there are no results yet from a toxicology laboratory in Lilongwe to indicate that the deceased had poisonous substances in her tissues. That in view of the foregoing therefore, it is evident that the safety of the applicant will not be compromised, and as such the applicant should be entitled to exercise his fundamental constitutional right to be released on bail. The applicant therefore prays that he be released on bail on such conditions as the court deems fit.

THE RESPONDENT'S CASE:

In his affidavit in opposition to the application, Mr Noel Supedi, Senior State Advocate deposed according to the information which came to him from Sub – Inspector Chikwemba of Soche Police. The applicant and his girl – friend Ulemu Kanike, now deceased were together at the applicant's house in Chitawira township on 14th July, 2008 at house number 285 where both of them were residing. It is stated by the deponent that the deceased asked the applicant to prepare a cup of tea for her as she was the 8 months pregnant. The deponent further states that the applicant indeed prepared the tea but never took it himself. Mr Supedi avers that after taking the cup of tea became the deceased became very sick and fell down right in the house. The deceased was then rushed to Mlambe Hospital where she dies 30 minutes after arrival. The deponent further states that a post – mortem report revealed that death was due to respiratory failure due to a poisonous substance. As a result, the applicant was then arrested and charged with the offence of murder at the Dalton Magistrate Court in Criminal Case Number 1316 of 2008, and has since been remanded at Chichiri Prison pending his trial by the High Court. The deponent further states that investigations revealed that the applicant and the deceased were at the time of the incident at logger heads over goods which they allegedly acquired from the United Kingdom where both had been working prior to their coming back home a few months ago. It is further stated that Police investigations are now over and that they show overwhelming evidence that poison was administered to the deceased, and that the post – mortem report will be supported at the trial by the oral testimony of Dr Dzamalala a pathologist who carried out the tests.

It is therefore contended on behalf of the State that the right to bail is not absolute but it is discretionary subject to the interest of justice and that when considering this issue courts take into account the likelihood of the accused attending trial, the risk that if released on bail the accused will interfere with the prosecution witnesses or tamper with evidence, the likelihood of his committing another offence or other offences and the risk to the accused person. It is further contended that the offence with which the applicant is charged with is very serious and that it attracts a maximum of death sentence. The deponent further contends that looking at the evidence available, it is more likely that the applicant would be severely punished if convicted, hence chances are high that if he is granted bail he would be tempted to abscond. As such the interests of justice weigh against granting the applicant bail

SUBMISSIONS:

I wish to commend both Counsel for the applicant and the respondent for their research and industry, on both the written and oral submissions they made to which the court is grateful. For reasons of brevity however, I may not be able to recite all their submissions within the course of this ruling, suffice to say that where necessary I shall have recourse to them.

ISSUE(S) FOR DETERMINATION:

The main issue for the determination of the court is whether or not the applicant should be granted bail in this matter.

THE LAW:

The law governing the issue of bail is Section 42(2)(e) of the Constitution as read with Section 118 of the Criminal Procedure and Evidence Code. Section 42(2)(e) of the Constitution provides as follows:

> S42 "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 detained person have the right;
>
> (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. The right to bail was also recognised in Section 118 of the Criminal Procedure and Evidence Code, a 1968 Act. The relevant part of that section ***inter – alia*** provides:-

> S118(1) "When any person other than 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 person may be released on bail by such police officer or such court, as the case may be, on bond with or without sureties:
>
> …
>
> (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 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 "Any 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".

It can not be doubted therefore based on the foregoing that the High Court has power under our laws both under Section 42(2)(e) of the Constitutional and Section 118 of the Criminal Procedure and Evidence Code to grant bail to any arrested or detained person who is alleged to have committed any offence. It was stated by Chief Justice Unyolo as he was then, heading a panel of Justices of Appeal comprising of Mtegha, Kalaile, Mtambo and Tembo in ***Fadweck Mvahe V Rep***[2] that:

> "The first principle is that the High Court has power to release on bail a person accused of any offence including [3]murder see page 4 para 4 of the ***Lunguzi*** judgement and page 4 para 1 of the ***Tembo***[4] judgement".

In the ***Lunguz***i ***case*** [supra] Chief Justice Richard Banda as he was then had this to say in 1995:

> "There has recently been a spate of bail applications and we consider it appropriate that we should give some guidance on principles which courts always bear in mind when applications for bail are brought before them. First, we would like to make it clear beyond any reasonable doubt that the High Court has power to release on bail a person accused of any offence".

In 1994, in the case of ***Christos Demetrios Yiannakis V Rep***[5] Mwaungulu, Ag J said, when he was faced with a similar question as to whether the High

[1] Bail Guidelines Act, 2000
[2] ***Fadweck Mvahe V Rep*** MSCA Criminal Appeal NO 25 of 2005
[3] ***McWilliam Lunguzi V Rep*** MSCA Crim Appeal No. 1 of 1995
[4] ***John Tembo and 2 Others V DPP*** MSCA Crim App No. 16 of 1995
[5] ***Christos Demetrious Yianakis V Rep*** [1995]2MLR. 505

Court had power to grant bail to a person accused of a capital offence under Section 118 of Criminal Procedure and Evidence Code;

> "Reading the sub – sections as they are I am very slow to accept the contention that the High Court can not grant bail to a person where the offence which the accused person stands charged is punishable with death…There is no situation here of an error or an omission of the draftsman. Sub – section 3 gives the Court power to direct any irrespective of what punishment he might get for the offence for which he is charged. On the literal understanding of the provisions, therefore, there is nothing in sub – sections (1) and (3) which prevents the High court from granting bail for capital offences".

It should further be noted that at common law the High Court had power to grant bail in capital cases. See ***Herbert V Vaughan***[1], ***Witham V Dulton***[2] and ***Burney's Case***[3]. In ***Witham V Dulton*** the court said:

> "This 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 a special reason".

The position is clear therefore that when Section 42(2)(e) of the Constitution is read together with Section 118 of the Criminal Procedure and Evidence Code, that an accused person is entitled to be released from detention as a matter of right unless the interests of justice require otherwise. Further, it must also be pointed out that Section 42(2)(e) of the Constitution has not created a new right, all that the said provision has done is to give the right to bail a Constitutional force. In the case of ***Amon Zgambo v Rep***[4], Chief Justice Banda, as he then was, said:

> "The right to bail is enshrined in the Malawi Constitution. Section 42(2)(e) of the Constitution provides that every person arrested for or accused of the commission of an offence shall, among other 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. The Court observed in

[1] ***Herbert V Vaughan*** (1625) 12
[2] ***Witham V Dulton*** (1689) Comb 111
[3] ***Burney's case*** (1695) 5 Mod Rep 323
[4] ***Amon Zgambo V Rep*** MSCA Criminal appeal No. 11 of 1998 (unreported)

> ***M^cWilliam Lunguzi V Rep*** MSCA Criminal Appeal No. 1 of 1995 that Section 42(2)(2) does not create a new right. The right to bail has always been available to an accused person and that all that the above mentioned Section really does is to give the right to bail Constitutional force. We would like to repeat, with emphasis what this court said in the Lunguzi case that Section 42(2)(2) does not create an absolute right to bail. The question whether bail should be granted or not is in the discretion of the court and it will refuse to grant bail to an accused if it is satisfied that the interest of justice so require".

The interests of justice require that an accused be present to stand upon the charge on which he or she has been charged. In ***Rex V Monrovin***[1] 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".

As was stated in the ***Amon Zganbo case***, [supra] the requirements of bail are merely to secure the attendance 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 court went further to say that the determination of this issue involves a consideration of other issues such as the seriousness of the charge, the severity of 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 further stated:

> "The court will take into account the issue of whether there are 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 other related issues such as whether the accused is aware of the identity of witnesses and the nature of their evidence, whether the witnesses have already made their statements to the police, or whether the case is still under police investigation, whether the accused is related to the witnesses and whether it is probable that they may be influenced or intimidated by him or her. The court will also consider whether there is reasonable likelihood that if released on bail, the accused will commit further offences".

[1] ***Rex V Monrovin*** (1911) 3 Mann LR 582

In the instant case, the applicant argues that he was arrested on 18th July, 2008 on allegations that he caused the death of his pregnant girl - friend Ulemu Kanike, deceased. On 21st July, 2008 the applicant was taken to the High Court and was then remanded in custody pending his trial. On 25th July, 2008, this court declined to release the applicant on bail on grounds that the occurrence of the crime was fairly recent and that his safety could not be assured. The court further ordered that the applicant would be at liberty to re – apply for bail if his trial did not commence within 60 days from the date of that order. Further it appears that on August, 26 my brother judge Potani, J refused to grant bail to the applicant noting that the 60 days I had ordered had not yet elapsed, hence the current applicant before me, which is opposed by the state.

It must be mentioned that although I had said that the applicant would be at liberty to re – apply for bail if his trial could not commence within the 60 days I had ordered, it is not automatic that once the applicant has re – applied for bail, then bail would be granted. The law is clear that in a case of a fresh application where previously one was refused, the court can only grant bail if satisfied that there had been a material change since the earlier application. In the ***Amon Zgambo case*** [supra] the court said:

> "The other matter we would like to touch on relates to the procedure to be followed in the case of a subsequent application, or subsequent applications, for bail. A court is not bound to entertain an application for bail where it has been previously refused unless it is satisfied that there had been a material change of circumstances. But where there has been a change of circumstances from an earlier unsuccessful application for bail the correct procedure is to bring a fresh application before the same court or another magistrate or judge of the same court. And where the circumstances have not changed, the correct approach is to proceed by way of appeal setting out the grounds upon which the lower court is alleged to have erred".

In the instant I have not come across any material change in the circumstances to warrant a reconsideration of the question of bail. The fact that the 60 days I ordered elapsed does not in any way mean that this is a change in material circumstances, as a matter of fact all that the court said then was that the applicant would be at liberty to apply for bail, and not otherwise. The applicant has not shown any material change in the

circumstances and as such I am unable to change my earlier views. Consequently the application must fail and I refuse to grant bail to the applicant.

Pronounced in Chambers at Principal Registry this 17th day of October, 2008.

Joselph S. Manyungwa
JUDGE