



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**BAIL CAUSE NUMBER 95 OF 2013**

**BETWEEN:**

**JAMES JANA MISOYA**

**APPLICANT**

**AND**

**THE REPUBLIC**

**RESPONDENT**

**Coram: Justice M.A. Tembo,**

Maere, Counsel for the Applicant

Mtonga, Counsel for the Respondent

**ORDER**

This is this Court's order on the application to be released on bail made by the applicant pursuant to section 118 (5) of the Criminal Procedure and Evidence Code upon refusal by the Blantyre Chief Resident Magistrate Court to release the applicant on bail. This application is supported by the State. Both the applicant and the State filed affidavits and filed skeleton arguments in support of the instant application.

This Court refused to grant the prayer to be released on bail sought by the applicant, as supported by the State, on the ground that since the applicant was denied bail and is in custody on other pending criminal charges unrelated to the instant matter it would be vanity and inappropriate on the part of this Court to make an order for bail. This Court instead directed the applicant to make an

appropriate composite application for bail before this Court if he is so minded and that such an application ought to include all charges where bail has been denied to him by the lower court. The applicant brought a fresh application laying down all the charges that the applicant is answering before the lower court and indicating the status on bail in such matters.

The facts of this matter are not in contention. The applicant was arrested on several allegations of robbery in December 2012. He was charged before Chileka Magistrate Court under criminal case number 360 of 2012 of robbery. He was also charged for another robbery before the same Court under criminal case number 365 of 2012. These cases were eventually transferred to and consolidated into a single criminal matter before the Chief Resident Magistrate Court on 22<sup>nd</sup> March 2013. In the consolidated criminal matter the applicant was jointly charged with the other co-accused of the offences of robbery when he appeared before the Chief Resident Magistrate Court in criminal case number 34 of 2013. Some of the applicant's co-accused were already on bail at the time the joint charges were being preferred against them and the applicant before the Chief Resident Magistrate Court.

When the applicant applied for bail, in the consolidated criminal matter, the Chief Resident Magistrate declined to grant him bail and it is in view of that decision that the applicant now applied to this Court to consider releasing him on bail. The Chief Resident Magistrate when denying bail to the applicant reasoned that effectively he would not grant bail to the applicant in this matter considering that the applicant herein was answering other charges of armed robbery, unrelated to the charges on this application, before the same Chief Resident Magistrate Court in which that court had declined to release the applicant on bail.

The applicant and the State fault the decision of the Chief Resident Magistrate. The argument is that the lower court did not take into consideration the interests of justice in deciding to decline to grant bail to the applicant. The interest of justice being the question whether the applicant would attend trial once released on bail. Further, the applicant and the State argue that the applicant's right to be treated equally with his co-accused, who are on bail on similar charges, was violated.

The applicant further adds that the only other case that is being prosecuted against the applicant is also before the Chief Resident Magistrate Court and is criminal case number 14 of 2013 which was previously before the Senior Resident Magistrate. The applicant in that case is charged with robbery and was denied bail by the Senior Resident Magistrate in January 2013 on account of the fact that it was likely he would abscond trial if released on bail due to the seriousness of the three robbery charges and the attendant lengthy imprisonment that would be a consequence on conviction. The applicant argues that since January 2013 there was no trial of this matter until November 2013 when the first prosecution witness testified. The applicant states that there are 11 witnesses in this matter meaning that the trial will take quite some time. The applicant argues that he has suffered lengthy pre-trial detention. Further that even if robbery is a serious charge the pre trial detention being inordinate and only a single witness having testified the applicant should be considered for release on bail.

The applicant appeals to this Court to consider releasing the applicant on bail considering various factors he has raised as follows. The applicant alleges that the State deliberately opens many cases against the accused person to make sure that they do not go out on bail. In the present case the applicant alleges that many cases were opened against him and ended at plea but only two cases are being prosecuted against him over a period of eleven months. The applicant further asserts that whilst all his co-accused were granted bail in criminal case number 34 of 2013 he was not granted bail which is a violation of his right to equality before the law. Further that in that case the State has only paraded seven out of sixteen witnesses and nine witnesses remain to testify which means this matter will take some time to conclude.

The applicant also asserts that in criminal case number 14 of 2013 only one witness testified out of ten witnesses. That means this case also has a long way to conclude. Further that in that case the only evidence that the State has is weak evidence being a confession statement that the applicant denies to have made.

The applicant states that his earning power has diminished as a result of his incarceration and he cannot effectively defend himself as he has difficulty funding his legal defence.

The applicant contends that he must be presumed innocent and in view of the fact that the applicant's co-accused were already granted bail in criminal case number 34 of 2013 and that there is no such overwhelming evidence against the applicant in criminal case number 14 of 2013 this Court should seriously consider granting bail to the applicant.

This Court wishes to observe that the State Counsel could have been more helpful to this Court by commenting on allegations of the weakness of the State's case in criminal case number 14 of 2013. State counsel has a duty to respond or comment on such matters instead of just dwelling on the single issue of equality before the law in the case number 34 of 2013 which is just one of the two cases on which bail to the applicant is under consideration. State counsel should therefore make every effort to be more helpful.

This Court agrees that the lower court ought to have considered bail on the matter before it in criminal case number 34 of 2013 and should have dealt with the usual considerations on bail instead of just saying that the applicant could not be granted bail due to the fact that he had been denied bail in a different matter or matters. This is more important given that some other accused had been granted bail in the same matter and denying bail, without expounding the reasons, could be perceived as unequal and discriminatory treatment of the applicant in relation to his co-accused who were given bail. Reasons for denying bail upon consideration of usual circumstances ought to have been given. The decision on bail was therefore not properly arrived at in criminal case number 34 of 2013.

Coming to criminal case number 14 of 2013 where it is alleged that the applicant was on pre-trial detention beyond the statutory limits. This Court is of the view that the applicant ought to have brought that fact to the attention of the lower court for its consideration. Right now the applicant had been in custody for eleven months without trial commencing. Trial only commenced recently. If that fact of expiry of pre-trial custody time limit had been brought before the lower court then the lower court should have taken the appropriate course of action. Unfortunately, the State counsel has not made any submission on these allegations which, to say the least, is unhelpful to this Court.

The applicant also alleges that the case of the State is weak comprising only of a disputed confession statement. Again it is rather unfortunate that the State counsel has not made any submission on this allegation which, to say the least, is again unhelpful to this Court.

It would not be in the interests of justice to allow the alleged abuse of the court system whereby only one witness is brought to trial over a period of 11 months as alleged. Where the evidence is alleged to be weak the fact that the charges are serious of itself should not lead the court to conclude that the accused is likely to be motivated to evade the trial.

In these circumstances, where the State agrees to the release of the applicant on bail, this Court finds that there are no reasons justifying the further incarceration of the applicant on bail as he was denied bail in criminal case number 34 of 2013 without reasons being properly furnished upon considerations of the guidelines on bail and there appear to be no proper grounds for presuming that he is likely to be tempted to abscond trial considering that the evidence against him is rather weak in criminal case number 14 of 2013.

The applicant is therefore released on bail in the matters before the lower court namely criminal cases number 34 of 2013 and number 14 of 2013 before the Chief Resident Magistrate Court. For the avoidance of any doubt, this Court makes it clear that, as for the other matters if at all which have not been specifically mentioned before this Court where it alleged that only plea was taken the same shall be considered by the presiding courts in regard to the relevant pre-trial custody time limits. Bail in this case shall not extend to such matters where only plea was taken and those shall be dealt with by the lower courts on case by case basis.

In this present case the following conditions shall attach to the release of the applicant:

1. The applicant shall enter a bond with the Malawi Government in the sum of K20, 000.00,
2. The applicant shall provide four reliable sureties who shall be his blood relations. Each surety to be bound in the sum of K10, 000.00 cash and shall be examined by the Registrar,

3. The applicant shall not leave the locality of his residence namely Mkwate in Machinjiri (area 9) without first informing a designated police officer at the relevant designated police station by phone indicating the destination of his travel and duration,
4. The applicant shall be under a curfew for the duration of his trial before the Chief Resident Magistrate and the same shall operate between 6.00 pm and 6.00 am daily.
5. The applicant shall report to the police station designated by the State every Monday and Thursday until conclusion of his two criminal matters in respect of which bail is granted herein namely criminal case number 34 of 2013 and criminal case number 14 of 2013 before the Chief Resident Magistrate Court.

The Chief Resident Magistrate Court is given power to revoke the bail granted herein in the event of proof of allegations of breach of any of the conditions 3 and 4 by the applicant, of course after affording the applicant an opportunity to be heard on such allegation.

Made in chambers at Blantyre this        December 2013.

M.A. Tembo  
**JUDGE**