



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
BAIL APPLICATION NO. 37 OF 2016

IN THE MATTER OF SECTION 42(2)(e) OF THE REPUBLIC OF MALAWI
CONSTITUTION

AND

IN THE MATTER OF SECTION 118 AND 161G OF THE CRIMINAL PROCEDURE
AND EVIDENCE CODE, CAP 8:01 OF THE LAWS OF MALAWI

AND

IN THE MATTER OF SECTION 16(6)(a)(ii) OF THE STATUTE LAW
(MISCELLANEOUS PROVISIONS) ACT, CAP 5:01 OF THE LAWS OF MALAWI

CLIFFORD LISTON	1 st APPLICANT
SIKENALA SINYOLO	2 nd APPLICANT

AND

THE STATE RESPONDENT

CORAM : Z NTABA, J.
: Mr. P. Chinguwo, Counsel for the Applicant
: Mr. M. Munthali, Counsel for the Respondent
: Mr. D. Banda, Court Clerk

Ntaba J.

RULING

- 1.1 The High Court, State Advocate Chambers, Legal Aid Bureau, Malawi Prison Services and the Paralegal Advisory Services noted that the number of homicide remandees in the Eastern Judicial Region was alarming embarked on prison camp courts in order to hear bail applications. The parties agreed that for these bail applications to take place within the prison premises on 23rd March, 2016.

- 1.2 The court decided that during this process it will allow for both the Applicant and State to make oral applications and submissions instead of sworn affidavits. Notably the State and PASI verified the facts relating to the date of the offence, where the offence took place as well as the particulars of the deceased, offender as well as the stage of the investigations. The rationale for these applications and bail camp courts were to ascertain the number of homicide remandees who have who have been in remand for more than the required statutory period and see if prison service which is overcrowded could be relieved. Furthermore, it was an opportunity for those accused person on remand to have an opportunity to be brought before court and be dealt with. Lastly, it was to allow the justice system to take stock of cases which might be speeded to trial.
- 1.3 The applications were brought under section 42(2)(e) of the Republic of Malawi Constitution as well as sections 161G and 118 of the Criminal Procedure and Evidence Code.

2.0 THE BAIL APPLICATION

- 2.1 The Applicant, Clifford Liston and Sikenela Sinyolo aged 17 and 20 years. The 1st Applicant and 2nd Applicant hails from Donda village under Traditional Authority Njolomole in Ntcheu district. The Applicant highlighted that he was arrested in relation to the death of Thembakako Dilikisi. He prayed that bail be granted.
- 2.2 The State in response indicated that the case was one of mob justice which resulted in the death of Thembakako Dilikisi under case docket number NU/CR/64/03/2015. The offence took place on 21st March, 2016 in Donda village. The facts are that on 18th March, 2016, there was a sudden death in the village and his relatives sought trial by ordeal by a witchdoctor. They stated that five (5) houses were destroyed and on the said day they also torched the house of the deceased after he had escaped into after being chased by the angry mob. He was caught and beaten with panga knives and stoned as well. The deceased was said to have died as a result of the injuries he sustained following the assault.
- 2.3 The State indicated that they had analyzed the case docket and noted that in terms of Sikenela Sinyolo, there was no evidence implicating as such they were of the view that they shall apply for a discontinuance under section 77 of the Criminal Procedure and Evidence Code. In terms of Clifford Liston, noting that he is a child, it was their view that under section 95 of the Child Care, Protection and Justice, the Director of Public Prosecutions requires social welfare recommendation as to how the person will reintegrate back into society. They had indicated that on their part, they need a social welfare report so as to determine issues on how to deal with the matter. They were therefore praying for an adjournment.
- 2.4 In terms of how the juvenile was remanded at the prison and not a juvenile detention centre, the State was not sure how it had happened as the law is clear that he needed to have been remanded at a reformatory school.

- 2.2 The State indicated that they were not objecting to bail as there were no factors to show that it would be against the interest of justice to release the Applicant on bail.

3.0 COURT'S DETERMINATION

- 3.1 The court on 23rd March, 2016 following the application by the State discharged Sikenala Sinyolo under section 77 of the Criminal Procedure and Evidence Code. The court on the said day also adjourned the case awaiting the social welfare report, however the State was ordered to commit to the High Court, the 1st Applicant by 31st March, 2016 and supply the social welfare report as well as report by the Director of Public Prosecutions under section 95 of the Child Care, Protection and Justice Act by 8th April, 2016. The State did not commit the 1st Applicant as ordered nor provide the two (2) reports. This court accordingly has proceeded to deal with the application in the absence of the said reports.

- 3.2 This court recognizes that the constitutional right to bail is enshrined in section 42(2)(e) of the Malawian Constitution. Malawian law also recognizes that the right to bail is not an absolute right and is subject to limitations of the interests of justice. Their Lordships in the *Mvaha* case stated that –

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

- 3.2 Courts, therefore must be mindful that in dealing with bail applications, they should ensure and remember that the interest of justice is fundamental and that all circumstances of the case should be weighed against this fundamental principle. Secondly, such interest should be carefully examined and properly balanced for both the State and the Applicant. This court is very aware that the granting of bail is further restricted by the court's discretion after examining all the issues laid before it. Notably, this balancing act is the court's duty and should be exercised by taking into account the Constitutional provisions as well as all other legal requirements.
- 3.3 In this application, the first issue would be pretrial custody. The Criminal Procedure and Evidence Code has set down in section 161G that pretrial detention for homicide suspects shall be ninety (90) days and after the elapse of the said period, the State has to petition the court requesting for an extra thirty (30) days. It is evident that the Applicant has been in remand since March, 2016 as such the statutory prescribed period has elapsed without the State taking steps to extend nor a court sanctioning his continued remand.
- 3.4 Furthermore the Bail Guidelines Act have in Guideline 4 of Part II, stipulates principles upon which a court should consider in granting or not granting bail. One of them being the likelihood that the accused, if released on bail, will attempt to evade his or her trial and which is one courts have emphasized on and seriously scrutinize when determining a bail application.

- 3.5 This court after carefully examining the facts and law. This court also recognizing that bail is a constitutional right although not absolute but available to all accused as long as the interest of justice require, this court therefore grants the Applicant his prayer.

4.0 ORDER

- 4.1 This court therefore orders that bail be granted.
- 4.2 The Applicant is therefore bound on the following conditions –
- 4.2.1 he pay a bail bond of a cash sum of K20,000.00 into Court before being released;
- 4.2.2 he produce two (2) sureties and each surety to be bonded in the sum of K100,000.00 not cash. The said sureties be examined by the Registrar within twenty one (21) days of this order on a date and time to be fixed by her;
- 4.2.3 he report every Monday and Friday to Ntcheu Police Station or his nearest police station (which station should be communicated to the court) except if required to report to Court on the same day;
- 4.2.4 surrender any travel documents to the said Police Station and not to leave the country without the written authority of the officer-in-charge of the Police Station;
- 4.2.5 seek written permission from the officer-in-charge of the said Police Station if they wants to travel outside Ntcheu;
- 4.2.6 be bound to keep the peace and refrain from tampering with state witnesses; and
- 4.2.7 not commit any crime during the subsistence of his bail.
- 4.3 The State is further ordered to do all necessary issues for pretrial procedures including committal procedures as plea taking will take place at the High Court in Zomba on 28th July, 2016 at 09.00 hours

I order accordingly.

Made in chambers this 27th day of June, 2016.



Z.J.V. Ntaba
Judge