



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CRIMINAL DIVISION**

**HOMICIDE CAUSE NO. 163 OF 2018**

**VICTOR SHUMBA**

**AND**

**JAMES MASACHE**

**V**

**THE REPUBLIC**

**Coram: Hon Justice M L Kamwambe**

Salamba of counsel for the State

Panyanja of counsel for the Applicant

Amos...Official Interpreter

Chiusiwa...Recording Officer

**BAIL ORDER**

Kamwambe J

The Applicants were arrested on 6<sup>th</sup> May, 2018 on the allegation that they caused death of Dingani Edward on the 12<sup>th</sup> day of March, 2018. On this day, the Applicants and the deceased were drinking beer together. They fought over a lady and thereafter the Applicants left. The deceased left afterwards using the same route the Applicants used. The deceased did not reach his house, instead he was found dead in the next day. One of the Applicant's shoe was found at the scene of crime. Surprisingly, as investigations were underway, the Applicants went into hiding for two months soon after the incident and were arrested in Blantyre on 6<sup>th</sup> May, 2018. At the time of hearing the bail application

investigations were over, the case docket was not yet with the State Advocate Chambers.

The State is of the view that bail be denied because the Applicants were a flight risk. I, nevertheless, granted bail on 5<sup>th</sup> October, 2018. It was observed that the lawful pre-trial custody limit had expired, and the State had not applied for extension of the same according to law. This meant that the Applicants were in unlawful custody which made them eligible to release under section 161 of the Criminal Procedure and Evidence Code and under section 42(2) (e) of the Constitution under which bail can be denied if the interest of justice requires so.

With the knowledge that the Applicants were at large for two months soon after the death of the deceased, this matter gave me very anxious moments whether to grant bail or not. The right to bail is not absolute and every case in Malawi is bailable unlike other jurisdictions which have certain offences not bailable. In its exercise of its discretion the court may grant bail. Such discretion must be exercised judicially.

In considering the principle of 'interest of justice' a court must look for evidence on affidavit from the State that the accused person is a flight risk that as such, may abscond trial, likely to interfere with prosecution witnesses or tamper with evidence, and the likelihood to re-offend (See **Mvahe v Republic** MSCA Criminal Appeal No.25 of 2005). Whether the accused will appear for trial the court considers factors such as whether he has a fixed abode, permanent employment or strong family ties.

It was held in **Yianakis v The Republic Criminal Appeal No. 37 of 1994** that in granting bail, the court considers, among other things, the assets held by the accused person and where such assets are situated and the means and travel documents held by the accused person which may enable him to leave the country. The court will also consider the likelihood of the accused person to intimidate or threaten witnesses or conceal or destroy evidence. All this must come by way of affidavit evidence. The court must also consider the safety of the accused person if released. If not safe



then the interest of justice will require him to continue in incarceration.

It is alleged that the Applicants hail from and have always lived in Chimkhwende village, T/A Bvumbwe in Thyolo district and have strong family ties. It is not explained why they were at large for two months soon after the fateful event.


Section 4 (a) (ii) of Part II of the Bail (Guideline) Act requires, inter alia, that the court do consider the strength of the case against the accused person and the temptation that he or she may in consequence attempt to evade trial. Despite that investigations are through, the State did not endeavour to provide on affidavit indication of the strength of the case against the accused. It is not enough that they were at large. How they explained their absence to the police after arrest might have carried important information. There are no leads as to the strength of the case whatsoever. Any doubt or uncertainty as to the strength of the case against the accused will be interpreted in favour of the accused. Apart from the fact that Appellants were a flight risk, which fact is not really buttressed by investigation as there is no explanation of disappearance, there is nothing more to move the court as a plausible interest of justice to justify incarceration. In any case, the lawful custody time limit had expired and no extension was sought. If this provision (section 161 G & H of the CP&EC) was not there, the accused would be languishing in prison indefinitely just as many have. Looking at all circumstances, I decided to grant him bail. On a second reflection however, I have decided to vary the bail terms so that sureties are bonded in the sum of K800, 000.00 each but not cash and not K300, 000. 00. Sureties should be informed of the variation and should sign for it.

The State has a responsibility to manage arrested persons properly knowing that under section 161 of the Criminal Procedure and Evidence Code time runs against them such that if the lawful custody time limit has expired, release ~~on~~ is more likely. The State agents should not be caught napping all the time. They should be co-ordinating arrests and prepare for bail applications proactively

other than being reactionary. In this way when lawful custody time limit is about to expire, you apply for extension.

The State could have applied for adjournment so that they furnish the court with further information so as to make a solid case against granting bail.

**Pronounced** in open court this 12<sup>th</sup> day of December, 2018 at Chichiri, Blantyre

A handwritten signature in dark ink, appearing to read 'M L Kamwambe', written in a cursive style.

M L Kamwambe

**JUDGE**