IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

CRIMINAL APPEAL N0.3 OF 2019

DAMIANO GULULE

V

THE REPUBLIC

Coram: Hon. Justice M L Kamwambe

Gulumba of counsel for the Appellant

Chitsime of counsel for the State

Amos...Official Interpreter

Msimuko ...Recording Officer

RULING ON BAIL APPEAL

Kamwambe J

The Appellant applied for bail on the 21st November, 2018 in the First Grade Magistrate Court where bail was denied on the grounds that he would interfere with witnesses and also that he would evade trial due to the strength of evidence. He re-applied on 18th January, 2019 after the State had called all its local witnesses whom earlier the court had feared that the Appellant had potential of interfering with. Counsel for the Appellant stated that there was change of circumstances since the fear of interference with witnesses was no longer relevant. The only remaining witnesses were a police investigator and medical officer. The court denied

The grounds of appeal are as follows:

1. That the magistrate erred in law in refusing to grant the Appellant bail in the absence of any evidence (facts) from the prosecution showing that the Appellant was likely to evade bail.
2. That the magistrate erred in law in refusing to grant the Appellant bail on the basis of strong prosecution evidence when the same is yet to be tested under the legal requirement of proof beyond reasonable doubt. The Appellant himself is yet to enter his defence.
3. That the magistrate's failure to address the Appellant's bail amounted to a denial of his constitutional right to be granted bail. There was no evidence tendered by the prosecution why it was in the best interest of justice that the Appellant should continue to be remanded in custody at Chichiri.
4. That the magistrate erred in law in failing to hold that the Appellant had the right to be presumed innocent until proven guilty by the court. The continued incarceration of the Appellant amounts to pre-trial punishment.
5. That the magistrate misdirected herself when she failed to find that bail pending trial will also afford the Appellant the opportunity to consult fully with counsel in preparation for his trial.

The State supports the court's denial of bail on the reason that according to law where there is strong evidence against the applicant the propensity to evade trial is greater and therefore bail should be denied. This is covered under section 4 (ii) of Part II of the Bail (Guidelines) Act as follows:

> *The principles which the court should take into account in deciding whether or not bail should be granted include the following-*
>
> *(i) The nature and the seriousness of the offence for which the accused is to be tried*
>
> *(ii) The strength of case against the accused and the temptation that he or she may in consequence attempt to evade his or her trial.*

(iii) The nature and the severity of punishment which is likely to be imposed should the accused be convicted of the offence against him or her.

Strength of the case against the accused is an important ground of appeal for this court to consider in this appeal. The Appellant says that there is no evidence that he may evade trial. I do not think that it is a requirement that evidence that he may evade trial should be given under this provision. Sub-section (ii) carries everything one requires and we need not look outside it. What I mean is that the strength of the case itself is sufficient for the court to deny one bail without extraneous evidence that the accused once attempted to break out of prison or that he was granted bail and absconded or that he was heard telling another person that once granted bail he will flee to another place or any other conceivable reason. It suffices that the case is strong against the accused. However, sub-section (ii) cannot in all cases be a reason to deny one bail. If the case in issue is a misdemeanour for instance, however strong the evidence may be, it would be absurd to deny one bail because he or she may abscond or evade trial because the sentence to be meted would not be severe. It would just be a fine or a few months imprisonment. But in cases which might attract severe sentences such as sentences over five years for instance, it would be logical and prudent to conclude that the accused may be visited with the temptation to attempt to evade trial. In this regard, it is advisable to consider sub-section (ii) alongside sub-section (i) and (iii) or any other relevant factors outlined in section 4 which would make sub-section (ii) complete and meaningful. The factor under sub-section (ii) should rarely, if at all, be considered alone but together with other factors as shown above so as to provide a convincing argument to support the Constitutional requirement of the *'interest of justice'* justifying further incarceration.

On the ground that there was no proof beyond reasonable doubt, I wish to disagree with counsel for the Appellant on the reason that at this stage evidence is on affidavit and therefore need not be that high standard at all. It is not sworn evidence and

in some instances, if not most, the evidence will not have been tested by cross-examination. As such, that the evidence is strong need only be enough to convince the court that for the time being the evidence on affidavit is persuasive enough to deny one bail. It is meant to be a lower standard than the criminal standard at conviction of *'beyond reasonable doubt'*.

At this stage, the strength of the prosecution evidence need not be tested under the legal requirement of *beyond reasonable doubt* as the Appellant wants us to believe. Where bail is granted in serious offences which are likely to attract severe sentences, strict conditions must be imposed, such as, sureties to be bonded in bigger amounts of money, though not cash. This has proved to work effectively most times as was the case in **The Republic v Limbani** who absconded trial and when the court summoned the surerities one of the sureties worked hard to have the accused re-arrested in fear of suffering paying to court a huge sum of bond money.

It is not surprising that in the case of **Hon Dr C Chilumpha, Y Matumula and R Nembo –v- The Republic** Misc Criminal Application No. 228 of 2005 Mkandawire J observed as follows at pages 10 and 11:

> *"Bail applications being what they are, the parties will usually rely on what we call affidavits. The State knowing very well that the burden is on them to show or prove that the best interests of justice require otherwise must produce affidavits with necessary information and evidence. They need not produce information or evidence that should prove the case beyond reasonable doubt. But certainly they should assemble such affidavits which would enable the court to come up with an informed decision."*

Funnily enough, this case was cited by the Appellant himself as if it was to his aid when it spoke against him.

On the issue of the magistrate not upholding the constitutional right of the Appellant of being presumed innocent, I do not know what he really means as he did not explain anywhere in his skeletal arguments. Thus, it is not supported by any argument, hence it will

be difficult for me to try to gauge what he wanted to mean. In any case, I do not see how this ground emanated from the ruling of the magistrate as if the magistrate clearly infringed the right. The magistrate never even suggested that the Appellant did not enjoy the constitutional right of presumption of innocent. I choose not to comment further on it.

Likewise in the fifth and last ground, I do not see how the magistrate misdirected herself by failing to find that bail pending trial affords the Appellant opportunity to consult with his legal representative in preparing for trial. It is common knowledge that bail pending trial affords accused opportunity to easily consult with counsel. This does not make bail automatic because that would deprive the discretion that the court enjoys in deciding whether to grant bail or not. Appellant has not argued this ground in his skeletal arguments, therefore I should not be seen to be discussing a matter whose length and width is not known.

Going back to what I have said above respecting the strength of the evidence as a lawful factor to deny bail, I find that it was insufficient reason on itself to deny bail. Counsel for the Appellant has submitted that the Appellant has five children sired by himself and eight others being children of deceased siblings that he is taking care of. He has also said that Appellant is Malawian from Thyolo who dwells in Mbayani where he runs a tailoring shop. And further that he has people to stand as sureties. He promises to abide by any conditions that the court imposes. It should be admitted that the offence of defilement is a very serious one and attracts a maximum punishment of life imprisonment. If convicted he may get a sentence not less than 10 years and such sentence is likely to tempt one to abscond from trial, as such, the court will have that in mind when granting bail. I grant him bail on the following conditions:

1. Appellant to be bonded in the sum of Thirty Kwacha (MK30,000. 00) cash
2. To surrender all travel documents if any to the Police Officer-In-Charge Ndirande police post.

3. To be reporting at the police post every week on Fridays for three months and thereafter, fortnightly.
4. To provide two sureties close relations residing in Malawi who shall be bonded in the sum of One Million Malawi Kwacha (MK1, 000, 000.00) each, but not cash.
5. Not to live Blantyre district without informing the police.

Made in Chambers this day of 8th March, 2019 at Chichiri, Principal Registry, Blantyre.

M L Kamwambe

JUDGE