

13th June, 2011

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

Bail Case No. 70 of 2011
CHIMWEMWE MPHEMBEDZU

-Vs-

THE REPUBLIC

CORAM: THE HONOMBER JUSTICE CHIRWA

Mr. Salamba, of Counsel for the State
Mr. Mambulasa, of Counsel representing the Accused
Mr. Cossam, Official Interpreter

RULING

Chirwa J,

This is Application by CHIMWEMWE MPHEMBEDZU for an order that he be released on bail from his detention at Bvumbwe Young Offenders Centre within such limits as this Court shall deem fit to impose. The Application is supported by an Affidavit sworn by MANDALA MAMBULASA, his Counsel. There are also skeleton Arguments filed in support of the Application.

The State, on their part, have also filed an Affidavit sworn by MAC MILLAN MARVEL CHAKHALA, a Senior State Advocate.

Let me at the outset confess that there has been a delay in the preparation of this Ruling due to the insistence by Counsel for the Applicant on a formal written Ruling considering the issues raised in his Skeleton arguments, the fact that the State had not objected to his client's release on bail on conditions, notwithstanding. The matter thus became more of an academic exercise on the part of this Court than a practical one.

The background of the matter as can be gathered from the Affidavit in support of the Application is that the Applicant is implicated in the death of a baby through arson. The Applicant and a certain Mr. Justin Ibu, his employer, were taken to Chileka Police Station where they were interrogated and eventually charged with the offence of murder. The Applicant was taken to Chilangoma First Grade Magistrate's Court where he was formally charged with the offence of murder and later taken to Bvumbwe Young Offenders' Centre where he has been detained since the 11th of October, 2007.

There is no doubt in this Court's mind that the Applicant as an accused person has a right under Section 42(2)(e) of the Constitution of the Republic of Malawi to be released from custody with or without bail unless the interest of justice require otherwise. And the burden of showing that it would not be in the interests of justice that the accused person be granted bail rests on the State which must give reasons in support of the assertion - see: FADWECK MVAHE- VS- THE REPUBLIC MSCA Criminal Appeal No. 25 of 2005 (unreported)

In the present case the State have through their Affidavit indicated that they have noted with curiosity the expert opinions of the two medical experts, Dr Chiume and Dr Stevenson and that on the totality of the facts they do not oppose bail so long as strict conditions are imposed. In the circumstances this Court would have been inclined to think that all that was necessary in this application was to determine the appropriate conditions to be imposed to the release of the Applicant on bail so as to ensure his availability at trial when so required to appear. This however, was not so in the mind of Counsel for the Applicant as earlier in this Ruling indicated.

From the submissions of Counsel it is clear to this Court that the present Application is premised mainly on two grounds, to wit,

- (i) the ill health of the Applicant and
- (ii) the delay in bringing up the Applicant for trial.

This Court will now proceed to consider these grounds as follows:

(i) The Applicant's ill health

Counsel for the Applicant is on this ground relying on the Medical Report by Dr Chiume (MBBS) and Dr Anna Stevenson,, (MBBS), BSc, MRCP (UK). In determining whether or not to release the Applicant the Court is by Section 6 (e) of Part II of the schedule to the Bail (Guidelines) Act (Cap. 8:05) required to take into consideration the state of health of the accused as certified by a Medical Practitioner. With due respect to Counsel for the Applicant the Medical Reports referred to above are not properly before this Court on the grounds that they have not been exhibited to the Affidavit in support of the Application. This Court is thus not in a position to place any weight on them. The same can thus not be a basis on which bail can be granted to the Applicant. However, since this Ruling is merely an academic exercise it is this Court's view that had the Medical Reports been properly before this Court the same would, no doubt, have sufficed as evidence of the ill health of the Applicant in terms of Section 6 (e), aforesaid, warranting the release of the Applicant. As a matter of fact the Reports show that the continued detention of the Applicant will only mean that his health will continue to deteriorate, the one Report also shows that the Applicant needs to undergo urgent investigation to identify the cause of his symptoms so that appropriate treatment can be initiated.

This Court however, concurs with Counsel for the Applicant in his submission that the authorities have a legal and moral obligation to protect the right to health of prison inmates. This Court would however, add that this obligation extends to all other citizens. This is clear from Section 13 (c) of the Constitution of the Republic of Malawi which provides as follows:-

"The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goal:-

(a)

(b)

(c) Health:

To provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care".

And since we have the following constitutional provision in place, a provision which clearly requires the State to make adequate provision for its citizens coupled with the provisions of the Prisons Act (Cap 9:02) This Court thus finds Counsel's reference to the provisions from the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and Peoples' Rights (the African Charter) or (the Banjul Charter); the United Nations Standard Minimum Rules for the Treatment of Prisoners Principal 22 (2) etc, for the purposes of this Application a futile exercise. The matter would have been otherwise had there been no local legislation obligating the State to provide adequate health care commensurate with the health needs of its citizens and the international standards of health.

This Court is also mindful of the fact that the present application is not concerned with the determination of the issue whether or not the authorities have provided adequate health care to the Applicant as an inmate or a prisoner. Had this been the case then this Court would have probably found the said provisions relevant..

(ii) The Delay in bringing the Applicant up for **trial**

Section 161F of the Criminal Procedure and Evidence Code (Cap 8 : 01)m provides as follows:-

The maximum period that a person accused of treason, genocide, murder rape, defilement and robbery may be held in lawful custody pending commencement of his trial in relation to that offence shall be ninety days".

The Applicant having been remanded to custody on the 11th day of October 2007 and having been so detained to this date without trial and without any reason for such delay being furnished by the State this Court agrees with Counsel for the Applicant in his submission that the period the Applicant has spent awaiting trial is unreasonable as it exceeds by far much the prescribed period of ninety days. And regard being had to the provisions of Section 6 (a) of Part II of the schedule to the (Bail Guidelines) Act, aforesaid, which require the court to take into account the period for which the accused has already been in custody since his or her arrest in deciding whether or not bail should be granted this Court would have been inclined to hold that the balance of

convenience lies in favour of the right of the Applicant to his personal freedom by having him released. The State having already indicated that they have no objection to the release of the Applicant and further the balance of convenience being in favour of such a release, as aforesaid, this Court thus orders the release of the

Applicant on bail on the following conditions, that is to say:-

- (b) that he should secure two blood-related sureties each to be bonded in the sum of K20,000.00, not cash, the suitability of the sureties to be ascertained by the Registrar of the Court in the presence of the State;
- (c) that he should be reporting to the Officer-in-charge at Chileka Police Station once a fortnight on Mondays;
- (d) that he should surrender any travel document that he may have in his possession to the Officer-in-Charge at Chileka Police Station; and
- (e) that he should not leave Blantyre District without first informing the Officer-in-Charge of Chileka Police Station indicating to him the destination of his travel and the duration of his stay thereat.

It is the view of this Court in passing that Counsel's submission that non-monetary condition could secure the Applicant's attendance at trial is untenable. Considering the nature of the offence the Applicant has been charged with, to wit, murder, it would certainly not be in the interests of justice to have him released without any monetary conditions. It is the view of this Court that it is very much doubtful if the Applicant would indeed be inclined to avail himself for his trial when required so to do. Further, even his sureties would not feel obligated to ensure his attendance at his trial if bail were to be granted on terms proposed by Counsel for the Applicant.

Dated this 21st day of November 2011

J.M. Chirwa

JUDGE