IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISC CRIMINAL APPLICATION NO 195 OF 2008

BETWEEN:

STEVEN KAPATUKA .....1ST APPLICANT

-and-

ENOCK SOLIJALA ..... 2ND APPLICANT

AND

THE REPUBLIC ..... RESPONDENT

CORAM: Hon. Justice M.L. Kamwambe
Mr. Supedi of counsel for the State
Mr. Mwangwela of counsel for the Applicants
Mr Edith Malani, Official Interpreter

RULING

Kamwambe J

The Applicants are seeking to be granted bail after being arrested on or about the 22nd and 23rd August 2008 respectively on suspicion that they were involved in an armed robbery that killed a person in Limbe. There is an affidavit in support sworn by counsel Mwangwela, and a supplementary affidavit too.

robbery and murder being serious ones in nature and that they would be followed by a long term of incarceration if the Applicants were convicted, would make the Applicants abscond bail (see s4 (a) of Act No. 8 of 2000 Bail (Guidelines.) I should also advise the state to hasten investigations so that at least for the robbery offence a speedy trial is conducted.

This is not a case in which one can readily grant bail, I thus deny to grant the application for bail.

Made in Chambers this 22nd day of September, 2008 at Chichiri, Blantyre.

M.L. Kamwambe
JUDGE

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL CASE NO. 111 OF 2008

BETWEEN

ZEFATI HWANGWA ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

CORAM : CHOMBO, J.

: Appellant, Unrepresented.
: Ms. Kahaki Jere for the State
: Mrs. Kabaghe, Court Reporter
: Mrs. Munyenyembe, Court Interpreter

JUDGMENT

The Appellant was charged with defilement of a girl who was 12 years of age at the time. When he appeared before the lower court and charged accordingly, the lower court indicates that he stated that he understood the reading of the charge and that he pleaded guilty thereafter. When prosecution narrated the facts of the case in court the appellant responded by stating that the facts were correct. In the said facts it was stated that the Appellant had on several occasions proposed love to the girl but she refused to have an affair with him. One day when the girl had gone to the garden the Appellant having

would also be discharged, for want of evidence, since the alleged armed robbery and murder offences occurred as a single transaction within moments of each other, so much so that the State would necessarily have to rely on substantially the same evidence it would have relied on in the robbery case. The appellant deponed that the speed with which the State withdrew the robbery charge simply showed that the State did not have faith in its case against him. He deponed further that he runs a minibus business and has a house in Ndirande where he lives with his wife and two children. He asked the court to grant him bail for these reasons.

The court below took the view that it would not be in the interest of justice, on the available facts, to release the appellant on bail, so the application was dismissed. The order was made by Mkandawire, J.

We will deal first with Criminal Appeals Nos. 25 and 26. As we have indicated the applications for bail in those two cases came before one and the same Judge. Five grounds of appeal were filed, but the substantial point taken is that the learned Judge erred in holding that the applicants, now appellants, had to prove exceptional circumstances before being admitted to bail on a murder charge, when section 42(2)(e) of the Constitution clearly stipulates that bail should be granted unless the interests of justice require otherwise.

As was pointed out by Counsel for the appellants, there are, in relation to bail applications by murder suspects, two conflicting views both in the Supreme Court and the High Court as to how the said section 42(2)(e) applies in such applications.

On the one hand this court held, in ***McWilliam Lunguzi v The Republic***, MSCA Criminal Appeal Number 1 of 1995, that the court's discretion to release a suspect in a murder case on bail is rarely exercised and only upon proof, by the applicant, of exceptional circumstances.

On the other hand this Court held, in ***John Tembo and 2 Others v the DPP***, MSCA Criminal Appeal Number 16 of 1995, that courts have a real discretion to grant bail, even to murder suspects, unless the interests of justice will clearly be prejudiced thereby, and that the onus is on the State to prove this.

These two conflicting decisions, both made by the final court in the land, have tended to confuse the courts as to which one should be followed. Notably the cases of ***Amon Zgambo v Republic,*** MSCA Criminal Appeal Number 11 of 1998, ***Brave Nyirenda v Republic***, MSCA Criminal Appeal Number 15 of 2001, and the present appeals of course, followed the ***Lunguzi*** case. On the other hand the cases of ***Dickson Zulu and 4 others v Republic***, Misc. Criminal Application Number 136 of 2001 and ***Ingeresi Mimu v Republic***, Misc. Criminal

> "…. the discretion to grant bail in the more serious offences must be exercised with extreme caution and care. Murder, apart from treason, is the most heinous offence known to the law. The punishment for murder, under our law, is death. The law of this country has always been that it is rare, indeed unusual that a person charged with an offence of the highest magnitude like murder should be admitted to bail. From a perusal of cases from other jurisdictions it is clear that this is also the law in most common law countries. The general practice in most commonwealth countries is that the discretion to release a capital offender on bail is very unusual and is rarely exercised and, when it is done, it is only in the rarest of cases and only on proof of exceptional circumstances."

It is on the authority of that judgment that several judges in the High Court have refused to grant bail to murder suspects on the ground that the suspects were required, and had failed, to prove exceptional circumstances.

On the other hand the approach taken by the court in the ***Tembo***judgment was that courts should grant bail even in murder cases unless the interests of justice would, in so doing, be prejudiced or frustrated. The court, per Unyolo, JA (as he then was) and Kalaile, JA, then set out some of the fundamental principles the court would have to consider in answering the question whether or not the interests of justice require that the accused be denied or granted bail. Specific mention was made of such principles as the likelihood of the accused

Constitution casts the burden on the State to show that interests of justice would suffer if a murder suspect was released on bail, it would be unconstitutional to require the applicant to prove exceptional circumstances, as this would tantamount to taking away a constitutionally guaranteed right through unconstitutional means.

On his part, counsel for the respondent vehemently defended the requirement of proof of exceptional circumstances in applications for bail by murder suspects. Counsel submitted that the requirement of exceptional circumstances gives meaning to the notion of interests of justice, in section 42(2)(e) of the Constitution, as it pertains to bail issues. He pointed out that paramount to the interests of justice is the probability of the accused person to stand trial and that the requirement of exceptional circumstances is justified on the basis that if such exceptional circumstances do not exist, the accused person will try and avoid his trial.

Counsel for the respondent further submitted that to rely on section 42(2)(e) in a wholesale manner, as was argued by the appellants, was to completely ignore that the section comes with a condition, namely, the existence of interests of justice. He submitted that arguing for the removal of the requirement of exceptional circumstances tantamounts to arguing for the removal of the said condition for, without this requirement, the condition will exist

said this it is however significant, as was submitted by counsel for the appellants, that the common law did not provide the right to bail as our Constitution does.

As we have just seen, section 42(2)(e) clearly provides that an accused person shall have the right to be released on bail unless the interests of justice require otherwise. Counsel for the respondent argued that this provision should be read as saying that an accused person may be released on bail if he proves exceptional circumstances to the court. With respect, clear as the section is, we are unable to join with counsel in this view. As we have repeatedly pointed out it is not disputed that with reference to the issue of bail, the onus is on the State to show or prove that the interests of justice require the accused person's continued detention.

In terms of procedure from experience what would happen in practice is that a murder suspect would make an application before the High Court asking that he should be granted bail. In most cases the complaint will be that he has been in custody for too long. He may add that he did not commit the offence he was arrested and detained for. He may also complain about his ill-health. Then according to section 42(2)(e) it will fall upon the State to show, by giving reasons, that the interests of justice require that bail should not be granted or, what is the same thing, by giving reasons why it would not be in the interests of justice to grant bail to the accused

Tembocase, is saying the State must prove in support of its objection to bail being granted. With respect, this latter approach in our view makes good sense. It is trite that he who asserts the existence of something must prove the same. If the State asserts that it would not be in the interests of justice that the accused person be granted bail, then it follows, on the principle just stated, that the State must give reasons in support of the assertion.

For the foregoing reasons, we hold, in agreement with the submission made by counsel for the two appellants, that the requirement of proof of exceptional circumstances by a murder suspect applying for bail in the High Court is not the correct approach, and should no longer be followed. Perhaps we should add, for the avoidance of confusion, that the requirement for proof of exceptional circumstances is sound and correct only in relation to applications for bail after conviction, as held in the case of ***Pandirker v Republic***, 6 ALR Mal. 204. It is only to that limited extent the principle of exceptional circumstances is applicable. Needless to mention on this aspect that section 42(2)(e) applies only to issues of bail before conviction, not after.

We now turn to Criminal Appeal Number 27. As earlier indicated, the court below refused to grant the appellant bail on the ground that, in the learned judge's view, it would not be in the interests of justice to do so. The lower court commendably followed the correct approach. However, the problem is that the court in its judgment did not come out clearly as to how it came to the conclusion that it would not be in the interests of justice to grant the appellant

bail. It was necessary and important for the court to state the precise issues, for example was it the likelihood of the appellant jumping bail and failing to appear for his trial, that exercised the lower court's mind. As it was, both the appellant and this court are left groping in the dark, so to say. For this reason, we are unable to support the decision of the court below on this aspect.

Finally, it will be seen from the remarks we have made here and there in this judgment that the real problem in these matters is that there was uncertainty to a large extent as to the correct approach and procedure to be adopted in applications for bail in the High Court by murder suspects. We hope that the position has now been clarified by this judgment.

Accordingly, in all fairness to the parties on both sides and indeed in fairness to the courts below, our order in the present appeals is that the appellants should promptly bring fresh applications for bail which the courts below will then deal with guided by the new procedure we have pronounced in this judgment.

DELIVERED in Open Court this 16th day of November, 2005, at Blantyre.

Sgd.: .....

I J MTAMBO, SC., JA

Sgd.: .....

A K TEMBO, SC., JA