IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CRIMINAL APPLICTION NO. 12 OF 2011

BETWEEN:

ANTHONY NJUNGA.....1ST APPLICANT

DASTAN MULENGA.....2ND APPLICANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: HON. JUSTICE POTANI

Mr. Nkosi, Senior State Advocate, for the State

Mr. Chakwatha Banda, Senior State Advocate, for the Applicants

Mr. Musicha, Official Interpreter

RULING

This is a bail application by Anthony Njunga and Dastan Mulenga who are currently being detained by the State on the allegation that they caused the death of Benson Ndona. The matter was first called for hearing on February 7, 2011, before the Honourable Justice Kamwambe who adjourned the hearing and in so adjourning, he made the following remarks:

> ***"I grant the State 14 days within which to furnish court with information."***

What prompted the adjournment appears to be that the affidavit, the State had then filed, deposed in paragraph 4 that it had not yet located the arresting police officer as such was not able to furnish to the court proper

information regarding the circumstances of the arrest of the applicants. As at the time that I heard the application, the State had filed an affidavit on the events leading to the arrest of the applicants on the basis of which it objects to the release of the applicants on bail. The State's objection to bail is essentially on two grounds namely that there is strong evidence that the applicants committed the offence in a very gruesome manner and secondly that tempers in the applicants' community are very high as to create the fear that once released on bail the applicants' safety would be in jeopardy.

Counsel for the applicants has urged the court to grant the appliants bail without considering the points of objection raised by the State in its affidavit because, according to Counsel, the point the State was supposed to address as per the court's order of February 7 is whether or not the applicants had voluntarily surrendered themselves to the police which the State has not at all addressed. I would, with respect, not agree with counsel. The order of the court when adjourning the matter as earlier quoted does not specify the issues on which the State was to provide the court with information. It would actually be most unfair to restrict the State's affidavit to information only relating to whether or not the applicants surrendered themselves to the police voluntarily. In order for the court to make a proper and informed decision on the question of bail, it is imperative that it must have any other pertinent information or facts before it. Thus although the State has not addressed the issue as to whether or not the applicants surrendered themselves to the police, that does not preclude it from presenting to the court other factors relevant to the application. The position, the court would take in the circumstances is therefore that the State does not dispute that the applicants surrendered themselves to the police as deposed in the affidavit in support. That notwithstanding the State is contending that the applicants should not be released on bail as their safety would be in jeopardy due to the alleged anger by members of their community towards them in the wake of the death of the deceased and that the evidence against the applicants coupled with the seriousness of the offence would likely tempt them to abscond which will be prejudicial to the interests of justice.

In the determination of the matter, the court would wish to make the following pertinent observations: The facts show that the events leading to the arrest of the applicants took place in October, 2010, a period of about four months ago. If indeed the State has overwhelming evidence against the applicants, one would wonder why they have since not been tried. The Bail Guidelines Act clearly stipulates that delay in an accused's trial through no fault of the accused is a facotr in favour of the granting of bail. This is reinforced by Section 161 G of the Criminal Procedure and Evidence Code which limits the maximum pre-trial detention period for the offence of murder to ninety days which period has since elapsed in this case. The essence of the right to bail is to guard against pre-trial punishment and it is

within that spirit that Section 161 G found its place in the statute books. What must also be noted is that the legislature, in enacting Section 161 G did not throw all caution to the wind but took cognisance that the right to bail is not an absolute right but one which has to be balanced with or weighed against the interests of justice and that is why provision was also made in Section 161 H for the State to apply for extension of the time for pre-trial detention where there are sufficient and good reasons for such an extension. In this case the State has not done so which presumably means it has no good grounds for such an extension.

Then there is the question of the safety of the applicants. I would qauickly wish to state that it is most probable that considering that the death of the deceased occurred over some four months ago, any tempers that might have been there have since faded if not gone completely. People's tempers usually cool off or down with the passage of time after a provocative or angering occurrence. Further if indded there are still flaring tempers, then the wise thing for the applicants would be to relocate so long they comply with the bail conditions.

In the light of the foregoing remarks and observations, the court is inclined to grant bail to the applicants on the following conditions:

1. Each applicant to enter a non-cash bond in the sum of K30,000.00.
2. Each applicant to produce 2 sureties one of whom must be a blood relation and each surety to enter into a cash bond in the sum of K20,000.00.
3. On the first Monday of each month beginning from the first Monday of April 2011, the applicants to be reporting to the arresting police before 12:00 noon.

Pronounced in Chambers this day of March 16, 2011 at Blantyre in the Republic of Malawi.

H.S.B. Potani

JUDGE