IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC CRIMINAL APPLICATION NO. 222 OF 1999

BETWEEN:

SIMAISI MAULIDI ..... APPELLANT

- VERSUS -

THE REPUBLIC ..... RESPONDENT

- AND -

MISC CRIMINAL APPLICATION NO. 224 OF 1999

BETWEEN:

LIKUNGWA UKASHA AND TENESI LUKUNGWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

CORAM: TWEA, J.
Kamwambe, Chief State advocate for State
Dokali, Representing the Applicant
Ngwata, Official Interpreter

that the deceased died of the fracture of the skull and resultant absess in the brain, and argued that the State was ready to charge the accused person. In the second case - the State merely conceded the violation of the applicants Constitutional rights and said they would be ready to charge the accused persons within this week. In both cases the State urged this court to consider these applications as habeas corpus applications and allow the State just sufficient time to charge the applicants.

The applicants strongly disagreed with this approach and submitted that the applications to enforce Constitutional rights should not be taken as initiation of the criminal process after failure by the State to comply with the Constitution. It was argued that such approach would be allowing the State freedom to violate detained persons Constitutional rights and render the Criminal justice system subject to the initiative of detained persons that can afford to hire lawyers.

Before I go far, let me just look at the relevant sections that have been referred to. Section 118(3) of the Criminal Procedure and Evidence Code States:

> "The High Court may, either of its own motion or upon application, direct that any person be released on bail or ..."

Section 42(2) of the Constitution reads as follows:-

> "Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -
>
> (a) .....

Section 42(1)(f) of the Constitution. This right must be read broadly and generously to give effect to the individuals fullest measure of the Constitutional protection. Be this as it may, what is the position where the detention is or may be lawful?

The Constitution puts a lot or qualifiers in such cases. Let me begin with the broad spectrum of human dignity and personal freedoms in section 19 of the Constitution. Section 19 (6) (a) states:

> "Subject to this Constitution, every person shall have the right to freedom and security of person, which shall include the right not to be -
>
> (a) detained without trial",.

This entails that if there is a possibility of law - fulness, then that detention is subject to one's right to trial: no one can be detained without trial. Section 42(2) (b) gives us the road to the trial process: to be brought before a court of law with 48 hours. This section is clear, it gives three options to the State; that the person (a) be charged, (b) be told reasons for his or her further detention, if this is not done, (c) that person must be released. This is where the problem begins.

It is becoming common that the State fails to bring such persons to Court and also fails to release them. Clearly Section 42(2)(b) is violated in such circumstances. If the State has not gathered sufficient grounds for charging that person, it must justify, before the Court, that there are valid reasons for further detaining that person, otherwise it must release that person.

Examples are abound from within and without the reason why courts should guard against eroding this right of detained persons. In the case of **ANC (Border Branch) and Another Vs Chairman, Council of State, Ciskei** 1995 (4) BCLR 401 (SA) at 411, Heath J. said:

accused of offences and are in custody as a special class whose right to be released may be restricted. They must be brought before a court of law and charged or be told reasons for further detention or be released. The right to be released may be with or without bail unless the interest of justice require otherwise. The right to be released with or without bail for such persons therefore, is subject to the interest of justice.

I have found that the State, and it has been admitted, violated the right of the applicants by not taking them before the court, to have them charged or informed why they should be further held in custody. They are entitled to be released subject to the interest of justice.

The interest of justice have not been defined in the Constitution, but our case law has it that this includes the requirement that the person will appear to take his trial, will not interfere with witnesses or the course of justice, will not commit further offences while on bail and is not unnecessarily prejudiced by being kept in custody. In otherwords the custody officer or court has to balance the interest of the community against the individual to determine where the interest of justice lie.

I had said the State was heard on both applications and it would be patently wrong if I ignored the views of the State. The State submitted that these applications should be treated as habeas corpus applications and that they be allowed sufficient time to charge the applicant. This was opposed by the applicants counsel, for reasons already given, and I agree with him. It would be a silent conspiracy to allow the State to deviate from the Constitution and then suffer it to correct this when a citizen applies to have his right rerspected. I therefore reject the States request, to treat these applications as habeas Corpus applications.

Having heard the State however, I find that it is only from their submission that I can balance the interest of community against the applicants'. In the first case I find that the state determine the cause of death of the deceased and are ready to charge the applicant for the death of