IN THE HIGH COURT OF MALAWI

LILONGWE REGISTRY

CRIMINAL DIVISION

MISCELLANEOUS BAIL APPLICATION NO 37 OF 2021

BETWEEN:

JOSEPH MWANAMVEKHA.....APPLICANT

-AND-

REPUBLIC.....RESPONDENT

CORAM : HON. JUSTICE KAPINDU

Kalekeni Kaphale Lawyers, Counsel for the Applicant

Mr. C. Saukila, Court Clerk/Official Interpreter

RULING

KAPINDU, J

1. Section 42(2)(e) of the Constitution of the Republic of Malawi (the Constitution) guarantees every person arrested for, or accused of, the alleged commission of an offence, the right to be released from detention with or without bail, unless the interests of justice require otherwise. It is an oft-cited provision in our courts that heightened to supreme law status the entitlement of any person detained by reason of the alleged commission of an offence, to be released from such detention pending his or her trial. So radical have been the implications of this provision

that even the requirement that in very serious offences such as murder, bail should only be granted where the detained person shows proof of exceptional circumstances, was long abolished by supreme Court pronouncements. See ***Fadweck Mvahe v Republic***, MSCA Criminal Appeal Number 25/2005. Thus, the moment a person is detained, his or her right under section 42(2)(e) is activated and the burden of justifying continued detention falls on the State. When a detained person makes an application to be released from detention, with or without bail, the starting position is that he or she should be released as of right, irrespective of the seriousness of the offence, unless the State satisfies the Court that the interests of justice require continued detention.

2. The Applicant in the present case, the Hon. Mr. Joseph Mwanamvekha, MP, has informed this Court, through an affidavit that he swore, that he was arrested on the night of 7th December, 2021 at Puma Filling Station at Chichiri shopping mall, and that he is being held in custody at Lumbadzi Police Station. Pursuant to the above referenced constitutional provision, yesterday afternoon, on 9th December 2021, he brought an application to this Court that he be released from detention on bail pending his trial, on any conditions that this Court deems fit. In addition to the affidavit in support earlier mentioned, the Application is also supported by Skeleton Arguments drawn up on his behalf by Messrs Kalekeni Kaphale Lawyers.

3. The Applicant's application has been brought *ex-parte*. In other words, he seeks that this Court should release him from detention without notifying, let alone hearing, the State about these proceedings. It is not clear why he has decided to take this rather unorthodox approach. I will come back to this issue on a point of law later below.

4. It is significant to point out that the Applicant, at paragraph 17 of his affidavit in support of the application [which has erroneously been characterised as a "sworn statement" – a term which is only known to

civil proceedings under the Courts (High Court) (Civil Procedure) Rules, 2017], states that:

> *"On 8th December, 2021, I made an application to be released on bail before the Chief Resident Magistrate Court, Sitting at Lilongwe but the Court refused to attend to the application since the police had not taken me before the court to be formally charged."*

5. He further states, at paragraph 18 of the affidavit in support that:

> *"The Chief Resident Magistrate Court directed that I should make the application before the High Court."*

6. It however strikes me with a great sense of surprise that notwithstanding this rather unusual statement allegedly made by the Chief Resident Magistrate, the Applicant does not provide particulars of the cause number of the proceedings in the Court below. I also find it rather odd that he does not exhibit a copy of the alleged decision by the learned Chief Resident Magistrate Court, in whatever form of writing it might have been made. Even if the alleged decision was orally made, which I should add would be highly uncharacteristic of the Chief Resident Magistrate, I would have expected the Applicant to expressly state under oath that the decision was oral.

7. I mentioned above that the present application has been brought *ex-parte*. The Applicant does not want the State to know that he has made this application. I am surprised with the Applicant's approach. This is so in view of the fact that the Court is aware, through judicial notice, that there are pending *inter partes* bail proceedings relating to the Applicant and the same subject matter herein, in the Senior Resident Magistrate's Court at Lilongwe in Criminal Case No. 1168 of 2021, that presently await determination. On the issue of judicial notice, Section 182 of the CP & EC provides for a set of facts in respect of which a Court

must take judicial notice. In addition, however, the common law has also laid out principles that guide a Court on the type of facts where the Court *may* take judicial notice. Blackstone's Civil Practice (2001), referring to the concept of judicial notice at common law, and which statement was adopted with approval by the High Court in ***Chiume and others v Alliance for Democracy (AFORD) and another II*** [2005] MLR 92 (HC); states that:

> *"Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from enquiries to be made by himself for his own information from sources to which it is proper for him to refer."*

8. The Court has adverted to this common law position in taking judicial notice of the existence of parallel proceedings on the same subject matter in the Senior Resident Magistrate's Court at Lilongwe.

9. Coupled with this is the fact that Part II Section 8 of the Bail Guidelines Act (Cap 8:05 of the Laws of Malawi) (BGA)is very clear:

> *"In all bail proceedings, the State should be served with notice of such proceedings."*

10. Yet, in the face of this express provision of the law, and notwithstanding the fact that he has already made application for bail in the Senior Resident Magistrate Court at Lilongwe which has been heard *inter partes*, and a decision whereof is still pending as I deliver this decision, he has still thought it appropriate to come to this Court alleging that he made a prior application before the Chief Resident Magistrate Court who declined to entertain his application on the purported ground that the police had not yet taken him before the court to be formally charged.

11. If indeed the learned Chief Resident Magistrate had made such a decision on the alleged basis, this Court would be quick to point out that the decision was wrong in law because under section 42(2)(e) of the Constitution, any and every detained person, is at liberty at any point after his or her arrest to apply to a competent Court for release on bail even within the 48 hours period prescribed under section 42(2)(b) of the Constitution. But I have already pointed out that this Court has not been furnished with evidence that such a decision was indeed made by the learned Chief Resident Magistrate. I will give further directions on this issue as I close.

12. That said, in view of the fact that the bail application herein has inexplicably been brought before this Court *ex-parte*, I hold that the application is irregular on the grounds that such an approach is patently incompatible with the dictates of Part II Section 8 of the BGA. On this ground alone, the Application herein fails and must be dismissed.

13. The application is also found wanting as the Applicant evidently substantially suppressed material facts. The Applicant failed to disclose to this Court that he had a pending Application before the Senior Resident Magistrate Court at Lilongwe. Even if he were to claim that he made the application before this Court first, and then proceeded to also file a similar application before the SRM's Court, then he surely should have withdrawn the present application. He has not done so. This turns the application into a clearly vexatious one. The Applicant seeks to vex the State into attending to the same issue of application for bail before a subordinate Court and the High Court at the same time. Such conduct constitutes an abuse of the process of the Court. Again, on this this ground, the Application herein must fail and thus falls to be dismissed.

14. Another issue is procedural. When one closely reads the BGA, the Act seems to clearly suggest that where proceedings are pending before a

subordinate Court, an application for bail should first be made in that Court, that is to say the subordinate Court, and only brought to the High Court by way of appeal. Part II Section 12 of the BGA provides that:

> *"No application for bail in any case pending before a subordinate court shall be entertained by the High Court unless bail was refused in the subordinate court."*

15. Part II Section 10 of the BGA provides that:

> *"Where the accused has been refused bail he or she may bring a fresh application before the same magistrate or court, or another magistrate or court, only if there has been a change of circumstances since the earlier application."*

16. Finally, under Part II Section 10 of the BGA, it is stated that:

> *"Where the circumstances have not changed, the accused may proceed by way of appeal setting out the grounds upon which the lower court is alleged to have erred."*

17. The proceedings relating to the arrest of the Applicant herein are certainly not in the High Court. They are in the subordinate Court. This means that an application for bail is not originally tenable before this Court in terms of Part II Section 12 of the BGA. If such a subordinate Court refuses bail, and there is no change of circumstances, then under Part II Section 10 of the BGA, the bail proceedings can only come to this Court by way of appeal.

18. This is the procedure that statute has prescribed, and it must be followed. The present application acknowledges that the Chief Resident Magistrate has refused to entertain the application, in other words that he has refused bail. The Court notes that instead of bringing the matter

before this Court by way of an appeal, the application has been brought as a fresh original application for bail. Again, this is irregular and the application stands to be dismissed on that ground as well.

19. The Court has also already alluded to the issue of insufficiency of information in terms of what really allegedly happened before the Court of the Chief Resident Magistrate. The Court needed clear exhibited proof of what exactly the Magistrate said. If, per chance, what the Magistrate said was oral, then the affidavit in support should have clearly stated so. Such insufficiency of information also vitiates the prospects of present application being favourably considered.

20. For the foregoing reasons, I come to the conclusion that the Applicant's application for bail before this Court cannot be and will not be entertained. It must fail. It is therefore dismissed in its entirety.

21. Before I leave, I need to make some consequential directions considering some of the observations that I have made in the present ruling:

    21.1 Counsel for the Applicant must, within two clear days from the date hereof, furnish under oath in an affidavit, details of the case reference number for the proceedings that took place before the Chief Resident Magistrate Court which, according to the Applicant have formed the basis of the present application; and

21.2 Counsel for the Applicant must exhibit a copy of the relevant page(s) of the Court record where the Chief Resident Magistrate made the decision refusing to hear the bail application and directing that the application should be made in the High Court.

41. It is so ordered.

Made in Chambers at Lilongwe this 10th day of December, 2021, 12:23 pm.

R.E. KAPINDU, PhD

JUDGE