JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL

Criminal Appeal No 16 of 2016

(Being Case Management Case No. 2694 of 2016)

BETWEEN

SAMUEL KAUDZU	**1ST APPELLANT**
ELLEN KANJETE	**2ND APPELLANT**
PATRICK KANJETE	**3RD APPELLANT**
MANIFORD DYSON	**4TH APPELLANT**
LAITON SAILESI	**5TH APPELLANT**

AND

REPUBLIC	**RESPONDENT**

CORAM: JUSTICE D F MWAUNGULU, JA

Maele, Counsel for the appellant

Salamba and Mtonga, Counsel for the respondents

Minikwa, official court interpreter

Legislation Considered

Bail Guidelines

Sections 1, 2 and 3

Bail Guidelines

Guidelines, 2 (1); 2 (2); 2 (3); 2 (4) (a); 2 (4) (a) (i); 2 (4) (a) (ii); 2 (4) (a) (iii); 2 (4) (a) (iv); 2 (4) (a) (v); 2 (4) (a) (vi); 2 (4) (a) (viii); 2 (4) (a) (ix); 2 (4) (a) (x); 2 (4) (b); 2 (4) (b) (i); 2 (4) (b) (ii); 2 (4) (b) (iii); 2 (4) (b) (iv); 2 (4) (b) (v); 2 (4) (b) (vi); 2 (4) (b) (vii); 2 (4) (b) (viii); 2 (4) (b) (ix); 2 (4) (c); 2 (4) (c) i); 2 (4) (c) (ii); 2 (4) (c) (iii) 2 (4) (c) (iv); 2 (4) (c) (vii); 2 (5) (c); 2 (5) (c) (i); 2 (5) (c) (ii); 2 (5) (c) (iii); 2 (5) (c) (iv); 2 (6) (a); 2 (6) (b); 2 (6) (c); 2 (6) (d); 2 (6) (e); 2 (6) (f);

Constitution, 1966

S. 2 (1) (iii)

Constitution, 1994

Sections 5; 9;11 (2) (a); 11 (2) (b); 11 (2) (c); 18; 19 (6); 39 (1); 42 (1) (f); 42 (2) (e); 42 (2) (f) (iii); 44 (1); 44 (2); 45; 103 (1); 103 (2); 104 (1); 104 (2); 108 (1); 108 (2); 110 (1); 110 (2); 110 (3)

Criminal Procedure and Evidence Code

Sections 35 (1); 118; 119; 161A, 161B; 161C; 161D; 161E; 161F; 161G; 161H (1); 161H (2)161H (3);161I; 161J,

Criminal Procedure Rules

Criminal Procedure Rules

Rules 1.1; 1.1 (2) (b); 1.1 (2) (c); 1.1 (2) (e); 1.1 (g) (iii); 1.2 (1) (a) (1.2 (1) (b); 1.2 (1) (c); 2.1; 3.2; 3.3 (a); 3.5 (1); 3.5 (2) (i) 17.25 (4); 41.7; 65.6; 66.3 (2) (e) (ii); 66.3 (2) (g) (ii); 67.4 (2) (g) (iv); 68.3 (2); 68.3 (2) (h) (iii); 68.6 (6) (f) (ii); 68.8; 68..3 (2) (a) (iii); 68.2 (h) (iii); 68.3 (2) (h) (iii); 68.6 (c) (f) (ii);68.9; 68.11

General Interpretation Act

Sections 47; 61

Parliamentary and Presidential Elections Act

Sections 96 (2); 92 (3); 99

Supreme Court of Appeal Act

Sections 2; 7; 8 (b); 11 (1); 19 (1)

Supreme Court of Appeal Rules

Orders 1, rule 18; 2, rule 1; 4, rule 13; 4, rule 13 (1)

Cases cited

Attorney General's Reference (No.3 of 1999)

Banda v Republic (2014) Bail Cause No. 81 (MHC/PR) (unreported)

Bowles v. Russell, 2007 WL 1702870 (U.S. 2007)

Chiwaya v Republic (2015) (Miscellaneous Criminal Application No 9 (MHC) (PR) (unreported)

Dzole v Republic (2016) Criminal Appeal No 14 (MSCA) (unreported)

Finance Bank of Malawi Ltd v Nicolaas Heyns and Nedbank Malawi Ltd (2010) Criminal Appeal No 45 (MSCA)

Foundation for Human Rights Initiatives v Attorney General (2008) AHRLR 235 (UGCC 2008),

Gadabwali v Republic (2013) Miscellaneous Criminal Appeal No 2 (MSCA) (unreported)

Kamaliza and others v Republic [1993] 16 (1) M L R 196

Kamfozi v Republic (2013) Bail Case No 100 (MHC) (PR) (unreported)

Kamwangala v Republic (2013) Criminal Appeal No. 6 (MSCA) (unreported);

Kasambala v Republic (2013) Miscellaneous Criminal Appeal No 5 (MSCA) (unreported)

Katumba v Musoke (Civil Appeal No 2 of 1998 (Uganda)

Langton v Republic (2008) Miscellaneous Criminal Application No 148 (MHC/PR) (unreported)

Libuuka v Electoral Commission and another (Constitutional Case No 8 1998

London and Clydeside Estates Ltd. v. Aberdeen District Council [1980] 1 W.L.R. 182, and 188-190

Lunguzi v Republic (1995) Criminal Appeal No 1 (MSCA) (unreported)

Makula International Ltd v His Eminence Emanuel Cardinal Nsubuga & another

Mangulama v Speaker of the National Assembly, [2007] M L R 139)

Masikeni and others v Republic (2015) Criminal Appeal No 14 (MSCA) (unreported)

Massy v Municipality of Yass (1922) 22 S R (N S W) 494;

McDonald R (On the application of) v Manchester Crown Courts [1999] 1 W L R 841

Mhave v Republic (2005) Criminal Appeal No. 25 (MSCA) (unreported)

Mpasu v Republic 2008) Miscellaneous Criminal Application No 38 (MHC/PR) (unreported)

Muluzi v Director of the Anti Corruption Bureau (2005) Criminal Appeal No 17 (MSCA) (unreported)

Patel v Gondwe (2015) Criminal Appeal No 31 (MSCA) (unreported)

Project Blue Sky Inc. v Australian Broadcasting Authority (1998) 194 CLR 355

R v Barlow (1693) 2 Salk 609

R v Crown Court at Worcester, ex parte Norman 164 JP 201

Re Eyre & Leicester Corporation [1892] 1 Q B 136

R. v. Immigration Appeal Tribunal, ex parte Jeyeanthan [1999] 3 All E.R. 231, at 237A-B

Regina vs. Soneji and another [2005] UKHL 49

Republic v Jasi (1997) Criminal Appeal Case No 14 (MHC) (PR) (unreported)

Republic v Pandirker [1992] 7 M L R 328

Rex v Hamilton (1944) D L R 116

Rex v Monrovin (19`13) Mann L R 582

S v Khumalo (1957/2012) [2012] ZAKZPHC 27 *S v Smith and Another*, (1969) (4) SA 175 (N)

S v Smith and another (1969) (U) SA 175,

S v Stanfield (1) SACR 221 (C)

Sabalu v Njuba, Election Petition No 26 of 2007, I November 2007

*Salvado v The St*ate 2001 (2) BLR 411 (HC)

Sheffield Corporation v Luxford, Sheffield v Corporation v Morell [1929] 2 K B 180

State v Registrar of Financial Services ex parte *Prime Insurance Ltd and another* (2016) Criminal Appeal No 41 (MSCA)

State v Electoral Commission ex parte *Jumbe and others* (2014) Judicial Review Case No 38 (MHC) (PR) (unreported

State v Electoral Commission ex parte *Muluzi and another* (2009) Constitutional Case No 2 (HC) (DC) (unreported)

State and 5 Others ex p Right Honourable Dr. Cassim Chilumpha, [2006] MLR 433

Suleman v Republic [2004] M L R 398

Taipi v Republic (2014) Criminal Appeal Case No 9 (MSCA) (unreported)

Tembo v Director of Public Prosecution (1995) Criminal Appeal Case No 16 (MCSA) (unreported)

Uche v Republic (2015) Criminal Appeal No 110 (MHC) (LR) (unreported)

(*Uganda DPP v Besigye* (Ref. No. 20 of 2005 9/25/2006 (Uganda, Constitutional Court

Uganda v Luzinda [1986] H C B 33

Yiannakis -v- Rep. (1994) Misc. Criminal Application No. 9 (MHC) (PR)(unreported)

Zgambo v Republic (1998) Criminal Appeal Case No 11 (MSCA) (Unreported)

Words or phrases judicially considered

"Bail"

"Unless the interests of justice require otherwise"

"Interests of justice"

Mwaungulu, J A

JUDGMENT

Introduction

The five appellants appeared, it appears, before different judges, in the court below. There is now a combined appeal. Two suspects, namely, Manfold Dyson and Laitoni Sailesi, are minors. The judgment of the court below, however, also covers Samuel Kaudzu, Ellen Kanjete and Patrick Kanjete. It also appears that Ellen Kanjete, known to the court and counsel for the state and the appellants, was already released on her willingness to give bail. She could not, therefore, have, without more, been subject of another application. The consequence of the order of the court below, therefore, cannot be that she is on remand.

This, notwithstanding, the appeal from the court below can only cover those who, in the court below, willing to give bail, for their release, applied for bail and were refused release. The inclusion of another, however, in part, not in whole, explains why, overlooking the individual circumstances of the appellants and consonant bail principles under the Bail Guidelines Act, the court below seemingly decided chiefly on that there would be a public outcry were all suspects released. No doubt the court can take judicial notice of that this homicide, on the pretext on witchcraft as it was and witchcraft by the elderly, caused public concerns.

Background

The appellants were arrested around January 2016 after murder on 25 January 2016 of four elderly people in Neno. A child of one of the suspects - released on bail – was struck by lightning and was pronounced dead on arrival at the hospital. The mother and villagers, convinced this was witchcraft, and by the elderly, rounded and assaulted four elderly to death. Five appellants were arrested for the homicide. Since, their arrest, their first and only attempt to be released – they were willing to give bail - was rejected by the court below on the judgment of the court below of 11 November 2016 – the court below heard the application on 11 July 2016.

In the court below, it was argued for two appellants that, beyond affirming innocence, they were young 15 and 17. Besides, it was contended, the state, whose usual hallmark is prolixity in prosecuting homicide cases, is uncertain when the appellants would be tried, if at all. The appellants, who had sureties ready, it was contended, were at the time of the application, over six months on remand - well beyond the maximum custody limits. It was argued vehemently that the appellants release could not disturb public order or undermine public peace and security or endanger the safety of the community because one suspect was released without such consequences.

The state, opposing the application, informed the court below that it submitted - without any action or reaction - 80 completed cases to the Registrar of the High Court - this was one of them - for setting in the April 2016 session. The state argued that it had a strong case, contending that the release on bail would enable the appellants to escape and, in view of previous outrage, disturb public order or undermine public peace and security or endanger the safety of the community. There was, in the court below, reliance on section 42 (2) (e) of the Constitution, section 118 of the he Criminal Procedure and Evidence Code and the Bail Guidelines Act. It was contended on behalf of the appellants, based on *Mhave v Republic* (2005) Criminal Appeal No. 25 (MSCA) (unreported), *Kamwangala v Republic* (2013) Criminal Appeal No. 6 (MSCA) (unreported) and *Banda v Republic* (2014) Bail Cause No. 81 (MHC/PR) (unreported) that the High Court could grant bail in capital offences. Based on the same decision, conceding that the right to bail was not absolute, it was contended for the appellants that the burden of proof being on the state to prove that it was not in the interests of justice to grant bail to the appellants, the state never discharged that burden.

Relying on section 161H of the Criminal Procedure and Evidence Code and Part 2, rule 6 (a) and (b) of the Bail Guidelines and the decision of the court below in *Kamfozi v Republic* (2013) Bail Case No 100 (MHC) (PR) (unreported and in this court in *Taipi v Republic* (2014) Criminal Appeal Case No 9 (MSCA) (unreported) on application for extension for custody time limits, the two appellants could not be released. The state's submissions only commended the interest of justice questions. Beyond the case of *Mhave v Republic* cited by the appellant's counsel, the state invoked the case of *Zgambo v Republic* (1998) Criminal Appeal Case No. 11 (MSCA) (Unreported). The state discussed the Bail Guidelines Act and the Bail Guidelines. The State made no submissions on the extension or, lack of it, of time of lawful custody.

The judgment of the court below never covered the appellant's contention that they are amenable for release because the maximum custody time limits were exceeded without extension. The court below equally never considered that the appellants, who had permanent place of aboard, had sureties ready to enter a bond for the appellants' presence at the trial. The court below also never considered that some appellants were minors. The lower court reasoning is in the following extracts. There is an appeal against the court's refusal of bail.

The practice and procedure for bail pending appeal are discussed at length in *Dzole v Republic* (2016) Criminal Appeal Case No 14 (MSCA). A single member cannot determine an appeal against refusal by the court below to grant bail to an accused person. There is a substantive appeal under section 11(1) of the Supreme Court of Appeal Act. The application for bail pending appeal should have, based on rules 1.1. 1.2 (b), 1,2 (c), 1.2 (e), 1.2 (g) (iii) 2.1, 17.25 (4), 41.7, 68.8, 68.9, 68.7, 68.3 (2), 68.3 (2) (a) (iii), 68.3 (2) (h) (iii), 68.6 (6) (f) (ii) of Criminal Procedure Rules effective 6 October, 2014 and 6 April 2015, been included or should have accompanied the notice of appeal. It was not. That would have enabled the court below to consider the application under Order 1, rule 18 of the Supreme Court of Appeal Rules and enable the appellants to refer to this court if the court below refused the application. As it is, there is an appeal to this court. This court based on (*Patel v Gondwe* (2015) Criminal Appeal No 31 (MSCA) (unreported), (*Muluzi v Director of the Anti Corruption Bureau* (2005) Criminal Appeal No 17 (MSCA) (unreported); *The state and 5 Others ex p Right Honourable Dr. Cassim Chilumpha,* [2006] MLR 433; *Mangulama v Speaker of the National Assembly,* [2007] M L R 139, *Finance Bank of Malawi Ltd v Nicolaas Heyns and Nedbank Malawi Ltd* (2010) Criminal Appeal No 45 (MSCA) (unreported), *Gadabwali v Republic* and *Patel v Gondwe* (2015) Criminal Appeal No 31 (MSCA) (unreported *The State v Registrar of Financial Services* ex parte *Prime Insurance Ltd and another* (2016) Criminal Appeal No 41 (MSCA) (unreported)) can, under Order 5, rule 1 of the Supreme Court of Appeal Rules, order compliance so that the appellant's apply for bail pending appeal in the court below. That would be dilatory and inconsonant with the duty to treat matters fairly under rules 3.3 (a), 3.5 (2) (b) 3.2 3.5 of the Criminal Procedure Rules. This court, therefore, waives the non-compliance or, if this is insufficient, dispenses, under Order 1, rule 4 of the Supreme Court of Appeal Rules of the requirement for an application for bail pending appeal so as to consider it. As discussed, the cases of *Gadabwali v Republic* (2013) Miscellaneous Criminal Appeal No 2 (MSCA) (unreported) and *Kasambala v Republic* (2013) Miscellaneous Criminal Appeal No 5 (MSCA) (unreported) do not reflect a correct understanding of section 7 of the Supreme Court of Appeal Act. The correct practice is in *Taipi v Republic* (2014) Criminal Appeal Case No 9 (MSCA) (unreported) and many other decisions of this court prior. The omission was ministerial. This Court and the Chief Justice have power to allocate the case to an appropriate forum. The appellant, however, has a right under section 24 of the Supreme Court of Appeal Act and, Order 4, rule 13 of the Supreme

Court of Appeal Rules and, grotesquely, the Criminal Procedure Rules, to bail pending appeal. Moreover, the case was moved to open court because the court's jurisdiction must be in open court unless the court orders a hearing in private (section 19 (1) of the Supreme Court of Appeal Act and rules 65.6, 65.6 (5), 66. 3 (2) (g (ii), 67.4 (2) (g) (iv) 66.3 (2) (e) (ii) and 68.11 of the Criminal Procedure Rules).

The question is whether the appellant should be released on bail pending appeal to this court from the refusal by the court below to release them on bail. If this court can quickly determine the bail appeal, that, no doubt, would be helpful. That, however, premises on that the appellants, who are in detention beyond the custody time limits, should continue a day longer without their freedom in circumstances where they are, probably, unlawfully detained. They have been in detention as minors and adults for more than 120 days. A court cannot, without causing grave injustice, sanction that. Section 42 (1) (f) of the Constitution provides:

> Every person who is detained, including every sentenced prisoner, shall have the right …to be released if such detention is unlawful.

Rights are expressed in absolute terms

The submissions, more especially, from the cases cited, emanate from certain expression of the right under section 42 (2) (e) of the Constitution. Consequently, how the right is described implicates on how, in view of the Criminal Procedure and Evidence Code and the Bail Guidelines through judicial pronouncements, to treat the right. It is often stated that the right in section 42 (2) (e) of the Constitution is not absolute (*Lunguzi v Republic* (1995) Criminal Appeal No 1 (MSCA) (unreported) and *Mhahe v Republic* (2005) Criminal Appeal No 25 (MSCA) (unreported). In *Zgambo Republic* (1998) Criminal Appeal Case No 11 (MSCA) (unreported) this court said:

> We would also like to repeat, with emphasis, what this court said in the *Lunguzi* case, that section 42 (2) (e) does not create an absolute right to bail. The question whether or not bail should be granted is in the discretion of the court, and it will refuse to grant bail to an accused if it I satisfied that the interests of justice so require.

Whatever the word "absolute" means, the right in section 42 (2) (3) of the Constitution, is, like any other right, expressed as an absolute. Rights, fundamentally, are described in absolute terms.

Rights are entitlements. Certain rights can, from the constitutional provision, be subject to something else or have a proviso. Neither makes the right any less absolute. They either adumbrate or provide context. The right to life, for example, is not any less absolute by suggestion that taking away life, through an order of the court, is not interference with the right. The right to life remains absolute only that it, the context of a court's decisions, is not infringed thereby. Equally, the right to release from detention or custody is absolute. It is not any less absolute because it is exercised in the context of interests of justice. Absolute rights, however, may be absolute in another sense. Rights are absolute which are not subject to limitation by law. Other rights, therefore, would be qualified rights because they can be limited by law. Their limitation, however, does not make them less absolute.

The words "unless the interests of justice require otherwise" must be interpreted broadly, liberally and neutrally. Negatively, they comport that, the right to be released from custody or detention does not arise where justice is achieved by detention. That would be a narrow understanding of the right. Detention or custody infringes, more specifically, the right to freedom and security of person, the right to freedom of movement and the right to be presumed innocent unless proven guilty under sections, respectively, 19 (6), 39 and 42 (2) (f) (iii), respectively, of the Constitution. Departure from these rights needs justification. The consequence of the rendition that the words comport that, the right to be released from custody or detention does not arise where justice is achieved by detention would create a right to be detained or be put in custody as long as it is in the interest of justice. This would not be a right but an obligation on the citizen to be detained and those in authority to detain or put into custody anyone suspected or accused of crime. Yet it is against this interference that the right exists in the first place.

There are bound to be cases where it is actually in the interests of justice to release a person from detention or custody. This would not necessarily be where interests of justice require otherwise. This would be where release from custody is the just thing to do, it is in the interests of justice to release or detain. It might be in the interests of justice to release where, for example, the court works in furtherance of Guideline 2 (6) of the Bail Guidelines. The words "unless the interests of justice require otherwise," therefore, must be understood as requiring a balancing act by a court. They must not be understood as prescribing a limitation or a condition for releasing in custody.

Section 42 (2) (e) and 42 (1 (f) of the Constitution did introduce something new

In *Tembo and others v Director of Public Prosecutions,* (1995) Criminal Appeal No 16 (MSCA) (unreported), this court said:

> In reply, the learned DPP agreed that section 42 of the Constitution does indeed create a right to bail. He, however, said that this is not a new right at all; it has always been there ... Pausing here, I wish to state that I would agree that, generally, speaking, the right to bail existed in our laws even before the present Constitution came into force.

Section 42 (2) (e) and 42 (1) (f) of the Constitution did introduce something new – "the right to be released from detention." The 1966 Constitution never included the right. The United Nations Universal Declaration of Human Rights was part of our law because of section 2 (1) (iii) of that Constitution. That declaration was entered to by a treaty. It was, therefore, to the Constitution, subsidiary law made under the Constitution. The United Nations Universal Declaration of Human Rights, in its 30 articles, never had a right in the form of sections 42 (1) (f) and 42 (2) (e) of the Constitution or a provision like it. Other international instruments, international or regional, came after the 1994 Constitution. Both sources of the right to release, if they be source, are subservient to the Constitution and made under it. The introduction of the right in section 42 (2) (e) of the Constitution was, therefore, a new thing.

Rights can be adumbrated or limited

Rights in Part IV, can be adumbrated or limited, under section 44 (1) and 41 (2) of the Constitution, by law – statutory, common international and customary law. Rights in the Constitution, therefore, are only the minima, if not a starting point. They are properly understood from statutes, judicial decisions, binding international law and customary law affecting them. They are also subject to judicial interpretation based on the rules of interpretation created by the court, international law and internationally decided cases (section 11 of the Constitution). Rights under the Constitution are, therefore, the beginning of and not the end of the inquiry on a right.

The right in section 42 (2) (e) and in 42 (1) (f)) is essentially a right to release, not a right to bail per se

The scope of the right in section 42 (2) (e) of the Constitution is organic based on judicial interpretation canons and international law and international judicial decisions. First, the right, for anyone arrested or accused of crime, is to be released from detention. That one is arrested or accused of a crime does not affect the right; it is the *sine qua nona* the right does not exist. Secondly, the right is to release unless the interests of justice do not require release of the prisoner. It is, therefore, by extension, in the interests of justice to release an accused person or suspect. Thirdly, the way the rule is expressed is significant. Since every deprivation of freedom or security, more especially, the right to movement, is, *prima facie,* unlawful and unconstitutional and violates the right to be presumed innocent, the right requires that detention be terminated unless it is shown that it is not in the interests of justice to release. It is in the interests of justice, because of the presumption of innocence, that proof or disproof of innocence should be achieved while citizens enjoy their full rights of freedom of movement and security and more so for the considerations in Guideline 4 (6) of the Bail Guidelines. Where, therefore, proof or disproof of innocence can equally be achieved by release as by detention, justice, the public interest and interests of justice conflate and confluence in favour of release of a suspect or a person accused of crime. Fourthly, consequently, the onus is, to demonstrate that it is in the interests of justice to release. Fifthly, therefore, the onus is not discharged simply by the suggestion that it is in the interest of justice to detain. The onus is discharged by showing that it is not in the interests of justice to release. Consequently, where the contention is that it is in the interests of justice to detain, the onus is on the one alleging. Sixthly, to prove that it is in the interests of justice not to release a person is more onerous than showing that it is in the interest of justice to detain. Seventhly, the higher onus is justified by the nature of the right which is the right to release. Eighthly, if it was otherwise, suspicion or accusation of a crime would, by themselves, be a justification for detention.

The accused or suspect can under section 42 (2) (e) of the Constitution be released just like that, as long as it is in the interests of justice or the interests of justice do not require otherwise. Where this is the case, the accused need not be released on bail. The release is unfettered - free. The release under section 42 (2) (e) of the Constitution can, however, be release on bail. The Constitution does not create a right to bail *per se*. Bail is incidental or coincidental to release. Section 42 (2) (e) of the Constitution provides:

> 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 ... to be released from detention, with or without bail unless the interests of justice require otherwise ...

Section 42 (2) (e) of the Constitution creates a right to be released from detention. The punctuation is critical to its interpretation. The comma is after the word release. Release from detention is the fulcrum of the right. The thought is obliterated that release, as in section 42 (1) (f) of the Constitution, is only for unlawful detention. *A fortiori,* where the detention is unlawful, the release is unconditional and unfettered.

The rule presupposes that detention after an arrest or accusation of crime is legitimate, justified or lawful. Section 42 (2) (e), nevertheless, creates a right to be released. Where detention is lawful, therefore, the release need not be unfettered. Section 42 (2) (e), therefore, allows for (1) an unfettered, as where the detention is unlawful, release (release without bail) and (2) a fettered release (with bail). To be released on bail, therefore, is one of and not the only way to be released from detention. Section 42 (2) (e) of the Constitution, therefore, recognises the other right to be released from detention under section 42 (1) (f) and 45 (2) (i) of the Constitution, the right to *habeas corpus*. The duality means that the two aspects of the right are distinct and *sui generis*. The words 'unless the interests of justice require otherwise qualify both aspects – release without bail and release with bail. A claim to be released from detention without bail is not affected, therefore, by laws concerning bail in statutes or the common law. Where a court is to release without bail, consequently, the prosecutor may demand that the accused person be released on bail. Applications for release under section 42 (2) (f) of the Constitution and under sections 161A-H of the Criminal Procedure and Evidence Code after expiry of custody time limits are some instances, not all, where a court, respectively, would release unconditionally and with the option to release with or without bail.

Custody time limits

Sections 161A-J the Criminal Procedure and Evidence Code were not part of our law until 2010. They adumbrate or enhance, rather than limit, the right to be released from detention with or without bail. The use of the word "lawful custody" in section 161A and 161B of the Criminal Procedure and Evidence Code is not incidental, accidental or coincidental. The question, therefore, is what are the consequences on detention should there be no extension or where the 120, after extension, days expire?

Court has no power to extend the custody time limits and must release the suspect or accused person after 90 days for homicides and 120 days, if there was an extension.

In *Kamfozi v Republic* the accused person, charged with murder, was in custody beyond the 90 days permissible maximum custody limit. It is unclear whether there was an extension under section 161H of the Criminal Procedure Code where the extension could only, if applied for, be for 30 days. The court below held that after that, based on section 161I of the Criminal Procedure Code, it was in the discretion of the court whether to detain or release the accused person on bail, the custody time limits, notwithstanding, having been exceeded. It, therefore, exercised discretion and released the accused person on bail. There were different conclusions in the same court in *Chiwaya v Republic* (2015) (Miscellaneous Criminal Application No 9 (MHC) (PR) (unreported) and in this court in *Taipi v Republic.* The court below in *Kamfozi v Republic* recognised that custody time limits arrested a mischief recognised in *Mhahe v Republic*:

> Prior to the enactment of these pretrial custody time limits, an accused person would be incarcerated after the State justified such further incarceration under section 42 (2) (e) of the Constitution as explained in the case of *Mhahe v Republic.* Such an accused person would be held in custody for indefinite periods of time before commencement of trial. That is the defect that Parliament intended to correct by these provisions in Part IV of the Criminal Procedure and Evidence Code…

Referring to section 161H of the Criminal Procedure and Evidence Code, the court below, correctly, in my judgment, made the following concession:

> The latter provision appears to take away any discretion on the part of the Court to further extend pre-trial custody time beyond the maximum 30 days regardless of compelling circumstances that would necessitate the same.

It is not for the court to express displeasure of an enactment of the legislature. The duty of the court, unless there are difficulties with its interpretive role, is to apply the statute as interpreted. The court, however, continued:

> I can envisage a situation where a criminal offence is transnational in nature. Such an offence may involve transnational trafficking of drugs from a foreign jurisdiction. It would not be far-fetched to think that in such kind of a crime police investigations would span several jurisdictions and would probably take more than the allowable maximum pre-trial custody time limit beyond the maximum allowed. The result in such a situation is that an accused person may be released even if such an accused person might act in a manner that would not be in the interests of justice in the circumstances say by interfering with investigations. I am therefore of the view that despite all the good intentions behind limiting the pre-trial custody time to a definite maximum it was not advisable to take away the discretion of the courts in deserving cases to extend the custody time limit. Beyond the maximum, after a careful consideration of the circumstances and upon being satisfied that there is good and sufficient cause for doing so….in the foregoing circumstances I am fortified in the view that it was not desirable to completely take away

> the discretion of the courts to extend pre-trial custody time in deserving cases and to state that any extensions of he pre-trial custody time shall be limited to 30 days in any event as expressed in section 161H (3) of Criminal Procedure and Evidence Code. When one considers what should happen after lapse of the maximum allowable pre-trial custody time limit it may be argued that it appears that the courts are actually left with a discretion on how they should deal with the accused person.

Section 161I of the Criminal Procedure and Evidence Code must be properly understood. The court below, relying on *Sheffield Corporation v Luxford, Sheffield v Corporation v Morell* [1929] 2 K B 180; *Massy v Municipality of Yass* (1922) 22 S R (N S W) 494; *R v Barlow* (1693) 2 Salk 609; and *Re Eyre & Leicester Corporation* [1892] 1 Q B 136, correctly, for that matter, concludes that sometimes 'may' means shall:

> It is very clear from a reading of section161I of the Criminal Procedure and Evidence Code that once the initial pre-trial custody limit expires without an application by the prosecution for an extension or the extension is granted and the period also expires then the court 'may' release the detained person on bail. The import of this scenario is such that the word 'may' entails that the court is bound to release the detained person because in the circumstances there appears to be no other option available to the court, where the pre-trial custody time limit has elapsed, other than to release the detained person on bail. In the circumstances it is the view of this Court that the word 'may' as used in section 161I is mandatory and equivalent to the 'shall' ...]

Section 161I of the Criminal Procedure and Evidence Code provides:

> Bail on expiry of custody time limit
>
> At the expiry of a custody time limit or of any extension thereof, the Court may of its own motion or on application by or behalf of the accused person or on information by the prosecution, grant bail to an accused person

The title to the section and marginal notes, though not part of the legislation, aid interpretation. The title or marginal notes clearly regard the situation after expiry of custody time limits. Once a custody time limit and extension expire, there is nothing in all these provisions or elsewhere to continue the detention of the accused person. The court must release the accused person. Any detention beyond these limits ceases to be lawful under section 161A of the Criminal Procedure and Evidence Code. If the detention is unlawful the right in section 42 (1) (f) of the Constitution arises immediately. The accused person or suspect must be released. The word 'may' in section 161A of the Criminal Procedure and Evidence Code covers options available upon such release. The court could - probably should, because the detention is unlawful - release the accused person unfettered and without an undertaking to appear. Section 161I of the Criminal Procedure and Evidence Code, in using the word 'may,' provides that the court, rather than release unconditionally, could, not should, release the accused person on bail.

The facts and the reasoning of the court below *Chiwaya v Republic* are in this succinct statement of the court below:

> But even if the State's grounds of objection were merited, which apparently is not the case, it is trite law that the maximum period that a person accused of murder may be held in lawful custody pending commencement of his trial in relation to that offence is 90 days (see: Section 161 G of the Criminal Procedure and Evidence Code.) The applicant herein as per the affidavits before this Court is said to have been arrested on the 28th of day of March 2015. It seems to follow thus that by the 28th day of June 2015 the period during which the applicant could have been held in lawful custody had expired. Thus, in the absence of any Court order for the extension of the said period, the applicant would be entitled to his release from custody as a matter of law. However, in order to ensure that the Applicant herein feels obligated to attend court for his trial whenever required so to do.

The court below is right that the accused person, without extension under and within the time stipulated in section 161H of the Criminal Procedure and Evidence Code, must be released as a matter of law. Having done so, the court below, released the accused person not unconditionally but on bail under stringent bail conditions.

The extension of time, however, is not done as a matter of course. Section 161H (2) of the Criminal Procedure and Evidence Code provides:

> Upon an application under subsection (1), the subordinate court or the High Court, as the case may be, may extend or further extend the custody time limit imposed under this Part if it is satisfied that there is good and sufficient cause for doing so.

"Good and sufficient cause for doing so" are constrained by the words "Upon an application under subsection (1)." In other words, the good and sufficient reasons must be when there is an application for extension and at least seven days before seven days before the expiry of the custody time limits. The court below in *Kamfozi v Republic* thought that good and sufficient cause for doing so, based on *McDonald R (On the application of) v Manchester Crown Courts* [1999] 1 W L R 841, applies when a court, because it has discretion to do so, after expiry of the custody time limits. The case of *McDonald R (On the application of) v Manchester Crown Courts* certainly is no authority for the proposition that the court can continue to detain an accused person after the expiry of custodial limit. The general law in the United Kingdom is that a court has no power to extend time limits after expiry of the custody time limit (section 22 (3) of the Prosecution of Offenders Act). The law is the same in Kenya. Curiously, *Kamfozi v Republic* was not cited or cited by the court below in *Chiwaya v Republic.*

Both these cases, moreover, were not referred to this court's decision in *Taipi v Republic.* Instead, this court considered its own decision in *Gadabwali v State,* the decision of the High Court sitting in a constitutional matter in *State v Electoral Commission* ex parte *Muluzi and another* (2009) Constitutional Case No 2 (HC) (DC) (unreported) and glanced decisions of the court below of *Mphindira v Republic* (2012) Bail Application No 75 (HC) (PR) (unreported), cases supporting *Chiwaya v Republic.*

In *Taipi v Republic* this court actually never commented on *State v Electoral Commission* ex parte *Muluzi and another* and *Mphindira v Republic.* It had, however, a lot on *Gadabwali v State.* In *Gadabwali v State* this court said:

> Immediately coming to my mind is Section 161I of the Criminal Procedure and Evidence Code … The appellant having already exhausted his period of lawful detention before commencement of his trial, therefore, I now, of my own motion, grant to Billiat Luberto Gadabwali bail.

In *Taipi v Republic* this court said:

> Thus, in our understanding of the Gadabwali case, the single Judge of this court who granted bail in that case on account of the lengthy detention the applicant therein had suffered beyond the expiry of the applicable pre-trial custody time limit, despite his dismissal that man's appeal, was precisely exercising the discretion the constitution gives to the courts in such matters when he concluded that the man was entitled to be released on bail … In our view, this need not mean that in so exercising its discretion and releasing Gadabwali the Judge irrevocably bound himself to, at all times and in all circumstances where the pre-custody time limits get exceeded, be granting bail to like applicants as a matter of course and/or of obligation … We hold, therefore, that the discretion Section 42(2) (e) of the Constitution offers to the courts to exercise in relation to all persons that have been arrested for or accused of crime, does not stop at the expiry of the pre-trial custody time limits that have been set by Statute. In our judgment, a consideration of the interests of justice remains of vital importance whenever a court is considering a pre-trial bail application, whether such application for bail is initiated before, or it is initiated on or after, the expiry of the applicable pre-trial custody time limit.

Gadabwali v State, a decision of a single member, was rightly decided. The reasons, even though by a full court, for departing from it, are far from convincing. It is unclear what discretion the court is given in section 42 (2) (e) of the Constitution. As seen, section 42 (2) (e) of the Constitution essentially creates a right to be released if, as here, a person is arrested or accused of a crime. If the court orders custody, the bail question does not arise. That release can be with or without bail. The ultimate right, therefore, is release. The discretion in section 42 (2) (e) of the Constitution, therefore, is whether the release should be on

bail or not. There is no discretion in the section to detain the accused person if the court has decided to release the accused person as of right and absolutely. Where the custody time limits are exceeded, without power to extend custody time limits generally, the accused person must be released after the expiry of custody time limits. The gist of this court's reasoning, however, is in the following passages. The court frames the problem as follows:

> Our assignment therefore, as we see it, is to determine whether it is legally correct for any court of law to exercise discretion when considering bail in cases where the applicable pre-trial custody time limit has been exceeded, or whether in such cases the court has no choice at all but to grant bail as a matter of course and in any event.

The situation in *Gadabwali v State* is a classic example where bad cases make good law. It is unfortunate that bad cases should make good law. Gadabwali disappeared for about 7 years while on bail. The state eventually arrested him. The state kept him in detention beyond 90 days without applying for an extension of thirty days under section 161 H of the Criminal Procedure and Evidence Code. Obviously, the court below and this court were animated by that Gadabwali had not remained true to previous bail. There was no explanation, however, for why up to the time the bail application came to appeal, Gadabwali was not prosecuted. From this set of facts, the question or problem cannot have been framed as this court framed.

The question could not have been what it was, to wit, does the court have power, after the expiry of the custody limit to consider, in the interest of justice, on whether to release the accused from detention on bail. Framed that way, the question presupposes that the accused person was supposed to be detained, after the expiry of the custody time limits, and, therefore, that the court could continue the detention if it was in the interest of justice. On the facts as outlined, the proper question should have been whether the court could, after the expiry of the custody time limits, or further detain the accused person with the result that the court could extend the custody time limits. Consequently, if the court could not continue the detention or extend time, the bail question arises, without consideration of the interests of justice, but only as alternative to absolute release. The court then says:

> Coming from the above premise, we find it important to reiterate the position the state has propounded before vis-a-vis the supremacy of the constitution over all other forms of law in our land. Section 5 of the constitution is abundantly clear in its demand, inter alia, that any law that is inconsistent with the constitution shall, to the extent of such inconsistency, be invalid. From this we surmise that any statutory provision, including the Sections 161 G and I of the Criminal Procedure and Evidence Code which the appellant has ascribed some independence to and from the constraints of section 42 (2)(e) of the constitution, ought to be subservient to the constitution. In our understanding, therefore, statutory provisions including the ones in issue, cannot afford, if they are on one and the same subject matter as the constitution addresses, to operate independently of what the constitution provides. Clearly, if they happen to run counter to the requirements of the constitution, they risk being to be invalid.

Obviously, the State's submission was incorrect. Section 5 of the Constitution does not apply, at least, not as directly to Part IV of the Constitution. The Court should not, therefore, have ceded to the argument. On the other hand, the appellant's counsel could not, if the submission was that sections 161A-J of the Criminal Procedure and Evidence Code were independent of, whatever that means, section 42 (2) (e) of the Constitution. This court, however, took section 5 of the Constitution too far and, therefore, to terrain(s) where it does not apply or, where it does apply, its application is limited.

Statutes can limit a right. Where, like here, they do, section 5 of the Constitution applies when statutes, purporting to limit a right, fail the muster in sections 44 (1) and section 44 (2) of the Constitution. The court related section 42 (2) (e) of the Constitution to section 161G and 161I of the Criminal Procedure and Evidence Code:

> In our judgment, therefore, as argued by the respondent in this appeal, sections 161 G and I of the Criminal Procedure and Evidence Code, being mere creatures of a statute, cannot pretend to be as powerful as, or even to be superior to, the provisions of section 42 (2) (e) of the constitution. Section 42 (2) (e) of the constitution sets the standard guideline for all courts in Malawi to follow vis-a-vis the situation of every person that has been arrested for, or been accused of, the alleged commission of an offence. Neither within

> itself, not within any other provision of the constitution, is there a confinement of this general guide to a limited period of time.

Within the Constitution, section 44 (1) and (2), to be specific, a statute can limit a right under Part 1V. Sections 161A-H of the Criminal Procedure and Evidence Code are not, by their nature, exuding any superiority to section 42 (2) (e) of the Constitution. They are, if anything, setting the wider context, as we shortly, in which section 42 (2) (e) of the Constitution will operate. They are not limiting time in which section 42 (2) (e) of the Constitution should operate. The general guide in section 42 (2) (e) of the Constitution is that accused persons have a right to be released unless the interests of justice requires otherwise. In the same spirit of guidance, Sections 161A-H of the Criminal Procedure and Evidence Code, provide accused persons ought to be released when they have been in custody for a given period.

There is, therefore, no conflict between Sections 161A-H of the Criminal Procedure and Evidence Code and section 42 (2) (e) of the Constitution. The court, however, says:

> A statutory provision, we are convinced, even if promulgated later in time than its parent constitutional provision can never be so potent as to set the boundaries within which the constitutional provision should operate. Without a doubt, therefore, whenever statutory provisions are being measured against constitutional provisions, as sections 161G and I are being measured in this case, they must of necessity be viewed as being subservient and obedient to the said constitutional provisions. If instead of being so subservient they are rebellious, then they lose their validity as pieces of law.

There is no rebellion. Sections 161A-H of the Criminal Procedure and Evidence Code must be understood as expanding and adumbrating the right in section 42 (2) (e) of the Constitution to be released with or without bail. They are an attempt by the legislature, in terms of section 8 of the Constitution, to enact laws where "values expressed or implied in this Constitution are furthered by the laws enacted." These are an instance where, under section 10 (2) of the Constitution, in the formulation of an Act of Parliament, the legislature, a relevant organ of State, gave "due regard to the principles and provisions of this Constitution."

Without the custody time limits, an accused person or suspect, to be released from detention, was at the mercy of the state. The accused or suspect could, before trial, be detained for as long and as many times at the state's pleasure. The citizen's right to release from custody was, therefore, abridged in that sense through the precarious and coercive power of the state to detain as long as it was necessary in the public interest to prosecute crimes and bring offenders to book. Sections 161A-J of the Criminal Procedure and Evidence Code limit the time within which a person accused or arrested of a crime can be detained waiting for trial. They enable release on bail or without bail as soon as there is no prosecution within the custody time limits or further extension. Sections 161A-J of the Criminal Procedure and Evidence Code do not limit but expand the right. They are not, therefore, subjected to section 44(1) and 44 (2) of the Constitution for whether they are reasonable, recognized by international human rights standards and necessary in an open and democratic society or negation of a right.

In *Taipi v Republic* this court thought that sections 161A-H ousts the power of the court to grant bail in the interests of justice. The section does not create a power for courts. The section creates a right. The emphasis on the power of the court than the right can distort the right. Even considering it from the power axis, sections 161A-H of the Criminal Procedure an Evidence Code do not oust the power of the court to consider bail – in the interests of justice. Section 161I and161J of the Criminal Procedure and Evidence Code actually retain, augment, complement, compliment and preserve the right. Section 161I is already considered. It empowers the court to grant bail within the custody time limits. Section 161J provides:

> Nothing in this Part shall preclude an accused person in lawful custody from otherwise applying for bail under any other law during the subsistence of a custody time limit.

Moreover, section 42 (2) (e) of the Constitution creates a right. In relation to section 42 (2) (e) of the Constitution, just like all other rights, section 5 of the Constitution does not apply as the court applied it. A statute can limit a right. If it does, it is not against the right. The court must, as was stated in *Republic v Jasi* (1997) Criminal Appeal Case No 14 (MHC) (PR) (unreported) and followed in the court below in *Kaunda v Republic* (2001) Criminal Appeal Case No (MHC) (PR) (unreported), *Tembo and another v Attorney General* (2003) Civil Appeal No 50 (MSCA) (unreported) go through a section 44 (1) of the Constitution process. This was not done in this case. The invalidity of sections 161A-H of the Criminal Procedure and Evidence Code could only be after that inquiry. Section 42 (2) (e) of the Constitution, therefore, cannot be a basis for overriding the time

limits that the legislature has not provided extension for by any other authority or court rather section 42 (2)(e) of the Constitution is the reason why the time limits must be obeyed. Section 5 of the Constitution should not have been applied to sections 161A-J of the Criminal Procedure an Evidence Code and section 42 (2) (e) of the Constitution. Section 44 (1) and (2) of the Constitution, in so far as section 42 (2) (e) is a chapter IV provision, a right, should have been applied ahead of section 5 of the Constitution.

Assuming it is a limitation, the court was not to proceed under section 5 of the Constitution. Sections 161A- to J of the Criminal Procedure and Evidence Code, as demonstrated, are not limitation on section 42 (2) (e) of the Constitution. It is, therefore, external to section 44 (1) and (2) of the Constitution consideration. Had this court proceeded under a section 44 (1) and (2) of the Constitution inquiry, it would have concluded that Sections 161A-J of the Criminal Procedure and Evidence Code, laws, were reasonable and necessary in a democratic society and do not negate section 42 (2) (e) of the Constitution. Custody time limits are peremptory in most democratic societies, the United Kingdom ((Section 22 of the Prosecution of Offences Act 1985 and Prosecution of Offences (Custody Time Limits) Regulations 1987), Netherlands (Articles 64, 65 and 67 of the Code of Criminal Procedure), United States (United States Code, Title 18, Sections 3141-3150), Scotland (Criminal Procedure (Scotland) Act 1995), Germany (Code of Criminal Procedure), Venezuela (Criminal Procedure Statute of 1998 (Codigo Processal Penal), Bolivia (Criminal Code, Law No 1.970), Costa Rica (Law No 7.594), Ecuador (Law No 000 RO/sup 360), Peru (Decree No 005 – 2003 – JUS), to name a few. In Uganda custody time limits are a constitutional matter. Section 23 (6) of the Constitution provides:

> Where a person is arrested in respect of a criminal offence) in the case of an offense which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offense before trial for one hundred and twenty days; c) in the case of an offense which is triable only by the High Court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offense before trial for three hundred and sixty days before the case is committed to the high court.

In *Foundation for Human Rights Initiatives v Attorney General* (2008) AHRLR 235 (UGCC 2008), therefore, the Uganda Constitutional Court declared unconstitutional a statute that set limits in excess of these constitutional limits. In a democratic society, because of the presumption of innocence, laws can only lean in favour of the liberty of a person rather than detention or continued detention.

Detention of a person even on suspicion of a committing a crime is an infringement of liberty – a form of punishment. Longer or further detention of a suspect is therefore, beyond infringing the liberty of a person, antithesis to the presumption of innocence. Whereas, therefore, detention may be necessary for punishing crime and punishing offenders, longer detention undermines the presumption of innocence. This principle must hold true that where interests of justice can be served by release as well as detention of a suspect or accused person a court must release. Laws, therefore, that further, fairness, liberty and presumption of innocence can never be construed as against the Constitution generally or section 42 (2) (e) in particular.

The epitome of the judgment, however, is in this statement:

> We are, we must say, convinced that in setting pre-trial custody time limits sections 161G and I of the Criminal Procedure and Evidence Code were not meant to dislodge, or to otherwise overtake, the constitution on its basic requirements for considerations of bail. Rather, we believe they were meant to aid the constitution by empowering the courts to, even on their own motion, step in and consider bail when they see the time limits not respected. We accordingly reject the argument of the appellant to the effect that these provisions have since set up a new regime of viewing pre-trial bail in all cases where pre-trial custody time limits have been exceeded.

Section 42 (2) (e) of the Constitution is not a provision on "basic requirements for considerations of bail." Section 42 (2) (e) of the Constitution is about a right to be released from detention. An accused person has a right to be released from lawful detention, all in the interests of justice. The release can be with or without bail. Bail, therefore, is incidental to that release. Bail is an undertaking by an accused person to appear at the trial. The requirements for consideration of bail only arise where the court decides to release; they do not arise where the court has decided not to release. Section 42 (2) (e) of the Constitution, therefore, is not all about bail. Sections 161A-H of the Criminal Procedure and Evidence Code are not dealing with the right to bail and, by extension, the requirements for consideration of bail. Sections 161A to section 161H of the Criminal Procedure and Evidence

Code deal with the right to release. They deprecate lawful custody for periods beyond set times and require immediate release with or without bail. Section 161J is clear that, within the time limits, the provisions leave bail questions under the general law intact. After the statutory time limits, section 161I is clear that bail may be considered but only by the way of granting it. At this point, the accused can no longer be in detention. The accused must be released as of right. The court cannot consider detaining the suspect in the interests of justice. The accused person must be released after the expiry of the custody time limit or the extension. After this the question is not whether the accused person should be detained. The question is whether the accused person should be released with or without bail. Sections 161D to G of the Criminal Procedure and Evidence Code use the word 'shall' for 'maximum custody time limits. The question, therefore, not considered in *Paipi v Republic* was whether the court could further detain, be it for reasons, after expiry of the maximum custody time limits.

Section 47 of the General Interpretation Act

The decision of this court in *Taipi v Republic* assumes or has the consequence of creating power of a court to extend time limits set by the legislature. A court, generally, whether under its rules or under its inherent power, can extend time limits set by itself under the rules of court. Moreover, section 47 of the General Interpretation Act provides:

> Where, in any written law, a time is prescribed for doing any act or taking any proceeding, and power is given to a court or other authority to extend such time, then, unless a contrary intention appears, such power may be exercised by the court or other authority although the application for the same is not made until after the expiration of the time prescribed.

This section does not deal with a situation, like here, where the written law does prescribe a time for doing any act or taking any proceeding but the same written law does not give power to a court or other authority to extend such time. This situation is covered by the general law we see shortly. Neither does section 47 of the Criminal Procedure and Evidence Code deal with where the written law has not prescribed a time in which to do a thing. This is covered by section 46 of the General Interpretation Act. Such situations, including where, written law does not prescribe time for doing something are covered by the general law. Under section 47 of the General Interpretation Act, the written law must fulfill two things (a) prescribe the limit under which an authority or court must do something and (b) give power to the authority or court to extend the time.

The court below in *State v Electoral Commission* ex parte *Jumbe and others* (2014) Judicial Review Case No 38 (MHC) (PR) (unreported) considered section 47 of the General Interpretation Act. The court below, in applying section 47 to section 99 of the General Interpretation Act, relied in approaches in two cases, even though, it appears from the judgment, many cases were before the court below of *Bowles v. Russell,* 2007 WL 1702870 (U S 2007) and *Makula International Ltd v His Eminence Emanuel Cardinal Nsubuga & another* (1982) HCB II. These two cases have problems. The court in *Bowles v Russell,* said:

> *Bowles v Russell*, supra, was relied on for the proposition that statutory time limits are jurisdictional and only Congress has the power to determine the lower federal court's subject matter jurisdiction, and appellate jurisdiction cannot be altered by court order "*because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.*"

The italicized statement is not *in tandem* with our Constitution which, in many provisions, indicates that the power of the courts emanates from the Constitution and, therefore, section 5 puts the Constitution above the legislature. Section 103 (2) of the Constitution underscores that the judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence. Section 104 (1) of the Constitution provides that there shall be a Supreme Court of Appeal for Malawi, which shall be a superior court of record and shall have such jurisdiction and powers as may be conferred on it by this Constitution or by any other law. Section 104 (2) of the Constitution provides that the Supreme Court of Appeal shall be the highest appellate court and shall have jurisdiction to hear appeals from the High Court and such other courts and tribunals as an Act of Parliament may prescribe. The jurisdiction of this Court in the Constitution is unbridled. Other laws can only add to its powers; they cannot cripple its constitutional power. Moreover, statutes can only add other tribunals, apart from the High Court, where appeals may lie to the Supreme Court.

Equally, the High Court under section 108 (1) has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. Under section 108 (2) the High court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

Section 110 (1) of the Constitution provides for subordinate courts; section 110 (2) of the Constitution provides for an Industrial Relations Court and section 110 (3) of the Constitution provides for traditional or local courts presided over by lay persons or chiefs. The legislature, therefore, has the powers described in *Bowles v Russell* only in relation to subordinate courts, an industrial court and traditional or local courts. The legislature does not have the largesse of congress.

The court, however, relied on this statement by the Court of Appeal in Uganda in *Makula International Ltd v. His Eminence Emanuel Cardinal Nsubuga & another…*:

> It is clear from this case that a period of limitation laid down under Civil Procedure rule can be extended if a statutory provision that permits the courts to extend time is made applicable to it by any enactment or rule. What the court cannot do is to go outside the limits of the Act, and extend time "in the purported exercise of a general discretion under his inherent powers". In other words, it is the use of the residual or inherent power to extend or enlarge time, when there is no enactment or rule that permits it, that is not authorised."

Neither counsel in *State v Electoral Commission* ex parte *Jumbe and others* cited before the court below the Ugandan Supreme Court of Appeal decision *Sabalu v Njuba,* (Election Petition No 26 of 2007, 1 November 2007) that in that jurisdiction overruled the Court of Appeal decision of *Makula International Ltd v His Eminence Emanuel Cardinal Nsubuga & another.* In the course of overruling *Makula International Ltd v His Eminence Emanuel Cardinal Nsubuga & another* Supreme Court of Uganda adopted – and this court does the same - the modern approach emanating from Australia and confirmed by the Privy Council. In the Australian High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, cited for different reasons by the court below, the court said:

> "… a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory, and if directory, whether there has been substantial compliance. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid….. In determining the question of purpose, regard must be had to the language of the relevant and the scope and object of the whole statute."

The approach was harbingered by Smith's Judicial Review of Administrative Action, 4th Ed 1980 page 142, where commenting on the mandatory and directory paradigm, the authors commenting on *The Secretary of State for Trade and Industry v Langridge* [1991] 3 All E R 591, said:

> The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequence of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if serious public inconvenience would be caused by holding them to be mandatory or if the court is for any reason disinclined to interfere with the act or decision that is impugned.

Consequently, Lord Steyn in the Privy Council in *Regina vs. Soneji and another [2005] UKHL 49 (HL Publications on Internet)* said:

> "A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply invalidates the act in question. Where it is merely directory a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance."

Lord Steyn, finding breath of fresh air from New Zealand, Australia and Canada said:

> Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in Attorney General's Reference (No.3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can be fairly taken to have intended total invalidity.

In the House of Lords, the approach is consequentialist. In *Attorney General's Reference* (No.3 of 1999), lord Steyn, with who Lord Cooke of Thorndon, Lord Clyde, Lord Hutton and Lord Hobhouse of Wood-borough agreed, said:

> My Lords, I acknowledge at once that reasonable minds may differ as to the correct interpretation of a subsection which has no parallel in PACE or any other statute. Nevertheless, there do seem to be secure footholds which may lead to a tolerably clear answer. It is not along the route adopted by the prosecution of asking whether the relevant provision is mandatory or directory. In *London and Clydeside Estates Ltd. v. Aberdeen District Council* [1980] 1 W.L.R. 182, and 188-190, Lord Hailsham of St Marylebone L.C. considered this dichotomy and warned against the approach "of fitting a particular case into one or other of mutually exclusive and starkly contrasted compartments." In *R. v. Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All E.R. 231, at 237A-B, Lord Woolf, M.R. now Lord Chief Justice, echoed this warning and held that it is "much more important to focus on the consequences of the non-compliance." This is how I will approach the matter

The Court of Appeal of England and Wales followed the Privy Council's decision in *Regina vs. Soneji and another* in *R. (On the Application of Winchester College) v Hampshire City Council, April* 29, 2008 [2008] EWCA Civ 431; [2008] R.T.R. 24.

The Supreme Court of Uganda, based on this approach found no difficulty, on the reading of the Act and the rules of court pertaining to elections, in concluding that the legislature intended that the time could be extended. Such time limits were extended in *Libuuka v Electoral Commission and another* (Constitutional Case No 8 1998; and *Katumba v Musoke* (Civil Appeal No 2 of 1998) in the Ugandan courts before the Uganda Supreme Court of Appeals before the Supreme Court overruled *Makula International Ltd v His Eminence Emanuel Cardinal Nsubuga & another* in *Sabalu v Njuba. Libuuka v Electoral Commission and another* and *Katumba v Musoke* from the same jurisdiction as *Makula International Ltd v His Eminence Emanuel Cardinal Nsubuga & another* were not cited in *State v Electoral Commission* ex parte *Jumbe and others. Sabalu v Njuba,* on this point, was followed by the Kenyan Court of Appeal in *Watitu v The Independent Electoral and Boundaries Commission and others* (Civil Appeal No 324 of 2013 where in extending the 30 days in which to file a notice under the election legislation was extended because the court had 6 months in which to exhaust election disputes. The statutory period of six months, however, was not extendable.

In *State v Electoral Commission* ex parte *Jumbe and others* the court below relied on a case that was overruled in the very jurisdiction. Decisions of Ugandan courts are only persuasive in this court. The decision of the superior court in Uganda is

not more overly persuasive than decisions of lower courts. This court could, in proper circumstances, follow the decision of the lower court in Uganda to the exclusion of the superior court. The principle evinced in the Ugandan Court of Appeal is archaic and arcane. The decision of the Supreme Court of Appeal of Uganda is consonant with approaches elsewhere.

The question in *State v Electoral Commission* ex parte *Jumbe and others* was not as the lower court understood it, namely, whether section was not plain and clear. Moreover, the court below could not state that section 99 of the Parliamentary and Presidential Elections Act was without ambiguity:

> The Commission shall publish in the Gazette and by radio broadcast and in at least one issue of a newspaper in general circulation in Malawi the national result of an election within eight days from the last polling day and not later than forty-eight hours from the conclusion of the determination thereof and shall, in such publication, specify—

The section could, as was done by the court below comport that all should be done within eight days after the polling day with the result that the additional words "and not later than forty-eight hours from the conclusion of the determination thereof" occurring within the eight days. The words "and not later than forty-eight hours from the conclusion of the determination thereof" would leave a scenario, to keep clear of the eight day restriction, where the results can only be published before six days. The other scenario would be that there are ten days in which to publish the results because if the determination was completed on the eighth day they may be published "forty-eight hours from the conclusion of the determination thereof." If any of these scenarios were intended, the section is far from clear. In legislative drafting, somewhere, the court would have inserted the words "whichever is the latter' or "whichever is the earlier." The matter must be left for further consideration.

On the other hand, because of section 96 (2) and (3) of the Presidential and Elections Act, the proper rendition of section 99 is that the determination should be published based on two events. Where the determination is made within the eight days, it must be published within the eight days and not later than ten days to allow for "forty-eight hours from the conclusion of the determination thereof." Section 96 (2) of the Parliamentary and Presidential Act provides:

> The determination of the national result of a general election shall begin immediately after the Commission has received records from all districts and shall, subject only to subsection (3), continue uninterrupted until concluded.

Section 96 (3)) of the Parliamentary and Presidential Act provides:

> If a record from any district or other element necessary for the continuation and conclusion of the determination of the national result of the election is missing, the Chairman of the Commission shall take necessary steps to rectify the situation and may, in such case, suspend the determination for a period not exceeding seventy-two hours.

Determination of the election, therefore, must remain uninterrupted and where, therefore, there is no determination of the election, there is nothing to publish. The Electoral Commission can, therefore, extend the time itself, subject to judicial review, the section itself providing, as long as and so that there is no interruption in the determination of the election. The Electoral commission cannot interrupt the process.

The consequences of breaching section 99 of the Presidential and Parliamentary Elections Act would, if invalidity or nullity followed, be reasons why the legislature should not have intended that disobedience results into invalidity. The consequence of ascribing nullity invalidity is that, there is no determination of the election and eight days have lapsed, there would be nothing to publish and the election outcome would not be known. Would the election be invalid, a nullity or never happened? The election may have to occur again and, at that simply because the electoral commission or the courts cannot extend the time. The citizen's right to vote, properly exercised would be frustrated by a mere requirement –a procedural one – that the electoral commission could not in eight days make a determination. Parties to the election, bent on frustrating the result could engage the electoral commission for long with the full knowledge that there could be a second poll. The legislature would not have intended such an outcome.

Where there is a determination, however, the Electoral Commission has to publish the determination within 48 hours or within the eight days. Consequently, the court can extend the time, despite section 47 of the General Interpretation Act, where there has been no determination and for good reasons.

The same result obtains on the contemporary principles laid in *Project Blue Sky Inc v Australian Broadcasting Authority,* cited by the lower court in its judgment in *State v Electoral Commission* ex parte *Jumbe and others, Regina v Soneji and_another* and *Sabalu v Njuba.* The question is whether the legislature in passing section 99 intended that the election proceedings be invalid should the time be exceeded with the result that if that is not the intention a court can extend time. The court must look at the section itself and in the context of rights, what rights are affected thereby. Reading the section itself, no

doubt, the legislature intended the determination not to be published as long as and so that there would be no interruption of the electoral process and only publish if there is a determination of an election. This is clear from sections 96 and 99 of the Parliamentary and Presidential Elections Act. If this was the intention of the legislature, this court will extend the time not because or despite section 47 of the General Interpretation Act but because it is, on interpretation of the statute as a whole and other relevant consideration, the intention of the legislature.

Section 47 of the General Interpretation Act only deals with written law where a time for doing something has been fixed and the written law provides for extension of the time by an authority or a court. Section 46, not section 47, of the General Interpretation Act deals with where the written law does not provide for time in which to do a thing and the court or authority are not given time to extend time. Neither section 46 nor 47 of the General Interpretation Act deals with a where, like here, a time is prescribed by a written law to do something and the written law has not provided for extension of time. Section 47 of the General Interpretation Act, only directory in the two circumstances obtaining, never applied to section 99 of the General Interpretation Act. Section 47 of the General Interpretation Act is not to be understood as meaning that a court has no power to extend time where the statute does not provide for extension of time.

In this case, the Courts Act does not confer power on the High Court to extend time generally. Section 161H (1) of the Criminal Procedure and Evidence Code provides:

> The prosecution may, at least seven days before the expiry of the custody time limit imposed under this Part, make an application to the subordinate court or the High Court, as the case may be, for extension or further extension of that time limit.

This section sets the first time limit. The prosecution must apply for extension of the time limit seven days before the time limit expires. The court, therefore, has power to extend the time limit after expiration of the prescribed time limit. A court, however, has no jurisdiction to extend the maximum, and the word means maximum, time limit if, *per chance,* the prosecutor does not apply seven days before the expiry of the maximum custody time limits. Section 161H does not provide for extension of time if not done before expiry. Under section 8 (a) of the Supreme Court Act, the law in the Criminal Appeal Court in England (and Wales) applies. Under section 22 (3) of the Prosecution of Offences Act a court cannot extend expired time limits.

Section 161H (2) of the Criminal Procedure and Evidence Code stresses that the extension can only be for on the prosecution's application:

> Upon an application under subsection (1), the subordinate court or the High Court, as the case may be, may extend or further extend the custody time limit imposed under this Part if it is satisfied that there is good and sufficient cause for doing so.

Naturally, the accused person cannot apply for extension of time for detention. The principle is *"expressio unius est exclusio alterius.* The section excludes the accused and the court. Consequently, the court cannot act *suo motu.* There is, however, an underlying duty on the accused person, as a participant, to comply with rule section 1.2 (1) (b) and (c) of the Criminal Procedure Rules and inform the court and the parties of the time limits as they occur in the case. Moreover, the court will only extend for good and sufficient cause. There are more important words in the section that need construction in view of this court's conclusions based on section 161I of the Criminal Procedure and Evidence Code: "extend or further extend the custody time limit imposed under this Part."

The context prescribes the words "extend" and "further extend." The word "extend" refers to extending time, seven days before, expiry of the time limit which, in this case, is, under section 161G of the Criminal Procedure and Evidence Code, 90 days. The words 'further extend' refers to extension after the first custody limit. There can be as many further extensions as possible. Those extensions are limited by Section 161H (3) of the Criminal Procedure and Evidence Code:

> Any extension or extensions of custody time limits under this section shall not exceed in total a period of thirty days.

Further extensions can be as many as possible provided that their total never exceeds 30 days. There is no general power to the High Court or any authority in the Courts Act or section 161G (3) (1) of the Criminal Procedure and Evidence Code or anywhere in the section or the Criminal Procedure and Evidence Code to extend the time in custody beyond the further extensions of 30 days. Section 161H (3), as in *Watitu v The Independent Electoral and Boundaries Commission and others,* itself allows extension and limits the extensions. Sections 161A to 161J would have been worded like the English legislation that, for good reasons, a court can extend time limits after expiry of the first custody time limit. Our legislation caps the time of the extension after the expiry of the first time limits, clear indication that the legislature, to preserve an accused person's or suspects rights liberty, security and presumption of innocence, there must be a cap beyond which, if the prosecution cannot, even for good reasons, not prosecute the crime and suspect or accused person within, the prosecution must be had with the accused person released freely or on bail.

Once the further time has expired or the prosecution has not applied before the expiry of the custody time limit, the court cannot lawfully keep the accused person in custody. The accused person or the suspect must be released. It is in this respect that section 161I of the Criminal Procedure and Evidence Code must be understood. While section 118 of the Criminal Procedure and Evidence Code requires that the accused or suspect must be prepared to give bail, section 161I of the Criminal Procedure and Evidence Code, after the time limits set are expired, empowers the court, either *suo motu,* on application by the accused or on information by the prosecutor, consider bail. At the expiry of a custody time limit or of any extension thereof, the Court may of its own motion or on application by or behalf of the accused person or on information by the prosecution, grant bail to an accused person. There is nothing in section 161I of the Criminal Procedure and Evidence Code to suggest that the court can extend the custody time limits beyond the 30 days in Section 161H (3) of the Criminal Procedure and Evidence Code. On the contrary, section 161I of the Criminal Procedure and Evidence Code requires the court to release the accused person immediately and consider releasing the accused person on bail. In Uganda, after the expiry of custody time limits, the court must release the accused person on bail; the court cannot further detain the accused person (*Uganda DPP v Besigye* (Ref. No. 20 of 2005 9/25/2006 (Uganda, Constitutional Court), followed in *Foundation for Human Rights Initiatives v Attorney General.* Our section 161I does not make it compulsory to grant bail to the accused person. The court must release; the court could release with or without bail.

The Criminal Procedure and Evidence Code, in all its 371 sections, does not give a court such power specifically or generally. The Courts Act neither in the additional jurisdiction of the High Court nor in all its 70 sections confers power to extend statutory set times. When considering *suo motu* to release, after the statutory limits, the accused person on bail, since an undertaking to appear for trial is a condition for release and onerous on the accused or suspect, the court must give the accused person an opportunity to be heard as to willingness to give bail. The accused person or suspect may, although not obliged to, ask that the accused person or suspect be released on bail. Given that under this section there is entitlement to release the accused person with or without bail, the accused person or suspect need not request for bail. The accused person may, however, under section 118 of the Criminal Procedure and Evidence Code be willing to give bail and if that is the case the court may on that request grant bail. Section 161A of the Criminal Procedure and Evidence Code, the prosecutor may act on information. One thread, not to be missed, is that under section 161A of the Criminal Procedure and Evidence Coode, the question is whether the release must be with bail – an undertaking by the accused person or suspect to appear for hearing. The question is not, at this juncture, whether the accused should be released. The suspects release is *fait accompli,* the discretion is should the release be with or without bail. The discretion, if at all, is whether the release should be with or without an undertaking to appear for trial.

In that sense section 161A of the Criminal Procedure and Evidence Code is permissive that the accused or suspect must be released on bail. This grounds on that the accused or suspect has a right under section 42 (2) (e) of the Constitution a right to be released with or without bail. The court could, therefore, release the prisoner without bail in which case there would be no need for the accused or suspect to enter into a bond or proffer sureties as required under section 119 (1) of the Criminal Procedure and Evidence Code:

> Before any person is released on bail, a bond for such sum as the police officer or court, as the case may be, thinks sufficient, shall be executed by such person and, where sureties are ordered, by one or more sufficient sureties.

This must be obvious where, in the spirit of section 161B of the Criminal Procedure and Evidence Code, detention beyond 90 days is in fact unlawful. Section 161A of the Criminal Procedure and Evidence Code must be understood as suggesting that where a person is suspected or accused of a crime, the court may consider releasing on bail rather than without bail, releasing, however, the court must. The times in section 161D-G are custody time limits properly called. They prescribe the time in which an accused or suspect may be detained for prosecutions. They harbinger that, should the prosecution fail to prosecute within that time, there is no justification that the prosecution should be had while the accused person is still in custody or detention. The purpose is to enable prosecution, and speedy and timely prosecution for that matter, of the accused persons. If these custody time limits were intended to be obeyed in breach by the prosecution and elastic to the courts, why have them?

These time limits must be observed by the court and the prosecution. In (*R v Crown Court at Worcester, ex parte Norman* 164 JP 201), the Divisional Court, more than two judges presiding on a matter, the court said:

1. there is a joint duty on the prosecution and the court to make early arrangements for the fixing of a trial date within the CTL;

2. ideally, the trial date should be fixed at the PCMH, with the directions then being tailored to the date that has been fixed;

3. if it is not possible to fix the trial date at the PCMH, the court should direct that the date be fixed before the expiry of the CTL and that the matter should be re-listed in the event that this proves impossible;

4. if it proves impossible to fix the trial date within the CTL, an application to extend should be made sooner rather than later, thereby enhancing the prospect of a date being fixed as soon as possible after the expiry of the CTL;

5. if the court fails to take the initiative, it is for the prosecution to press for a date within the CTL, the duty on the defence being to provide the names of witnesses required so that their availability can be ascertained.

The scheme in sections 161A-J is akin, in relation to subordinate courts and to the High Court, to sections 261 and 302A, respectively, of the Criminal Procedure and Evidence Code also introduced in the 2010 amendments. Section 261 provides:

> (1) Subject to subsections (2) and (3), the trial of any person accused of an offence triable by a subordinate court, other than any other offence punishable by imprisonment of more than three (3) years, shall—
>
> > (a) be commenced within twelve months from the date the complaint arose; and
> >
> > (b) be completed within twelve months from the date the trial commenced.
>
> (2) Where the person who committed the offence is at large, the period prescribed by subsection (1) within which to commence the trial shall run from the date the person is arrested for the offence.
>
> (3) Where the cause of the failure or delay to complete the trial scribed by subsection (1) is not attributable to any conduct on the part of the prosecution, the court shall order such extension of time as it consider necessary to enable the completion of the trial.
>
> (4) A person accused of an offence shall not be liable to be tried, or continue to be tried, for the offence of his trial is not commenced or has not been completed within the period prescribed by subsection (1), and in such case the accused shall stand discharged of the offence at the expiry of such period.

Section 302A provides:

> (1) Subject to subsections (2) and (3), the trial of any person accused of an offence triable by the High Court other than any other offence punishable by imprisonment of more than three (3) years, shall—
>
> > (a) be commenced within twelve months from the date the complaint arose; and
> >
> > (b) be completed within twelve months from the date the trial commenced.
>
> (2) Where the accused person is at large the period prescribed by subsection (1) within which to commence the trial shall run from the date the person is arrested for the offence.
>
> (3) Where the cause of the failure or delay to complete the trial within the period prescribed by subsection (1) is not attributable to any conduct on the part of the prosecutions, the court shall order of time as it considers necessary to enable the completion of the trial.
>
> (4) A person accused of an offence shall not be liable to be tried, or continue to be tried, for the offence if his trial is not commenced or has not been completed within the period prescribed by subsection (1), and in such case the accused shall stand discharged of the offence at the expiry of such period.

There is no power to extend these times except to the extent suggested. Consequently, where failure or delay is by another other than the prosecutor, a court may release the suspect for expiry of the time limits and the prosecutor proceed with the prosecution up to the expiry of the prosecution time limit if the prosecutor is not at fault. Where the prosecutor is at fault or no other person is at fault the court can release the accused person or suspect after the expiry of the custody time limits and the prosecutor can only prosecute in the prosecution time limits.

This court conclusion in *Taipi v Republic* that a court, can because of section 46 (2) (e) of the Constitution, refuse to release the accused or suspect after the 90 days in the interests of justice bases on miscomprehension of the right in section 42 (2) (e) as adumbrated in the Criminal Procedure and Evidence Code and the Bail Guidelines Act. Since sections 161A-J uses the word 'shall' in relation to the custody time limits and their extensions the task, according to the principles in *Project Blue Sky Inc v Australian Broadcasting Authority, Regina v Soneji and_another* and *Sabalu v Njuba*, is to determine whether, on the construction of the sections themselves and the whole of the Act and the right the sections wants to protect, the legislature intended that detention beyond the extended time should be invalid.

Starting with the sections themselves, section 161G of the Criminal Procedure and Evidence Code, the one applicable to murder, the words used, like in sections 161D-F of the Criminal Procedure and Evidence Code, are "maximum periods." The legislature intended that these periods be not the minimum, but the maximum. The words "minimum periods" connote that periods above are the ones permissible. The legislature chose the words "maximum periods" demonstrating that period beyond them are impermissible. The legislature allowed for minimum extension. The legislature meant that detentions beyond the maximum should be invalid. Sections 161D-G, therefore, are supported by words prescribing the maximum extension time – 30 days. The scheme of these provisions is akin to sections 261 and 301A regime. The times there cannot be extended. It is significant that sections 261 (2) and (3) and 301A (2) and (3) of the Criminal Procedure and Evidence Code that disapply these prosecution limits in subordinate courts and the High Court where the accused is at large or delay is through no fault of the prosecution are absent in sections 161A-J of the same Code.

The consequences of regarding sections 161A-J of the Criminal Procedure and Evidence Code as directory are a reason why these provisions must be understood as mandatory not directory. The positives of sections 161A-J are that the state is given the privilege of prosecuting the crime and the offender while in custody for reasons which are understandable in, as in this case, one hundred and twenty days. Where that is not possible sections 161A-J of the Criminal Procedure and Evidence Code requires that the prosecution must proceed with the accused person while not in detention. The state, so to speak, loses the privilege or the right to prosecute the accused person while in custody. The maximum periods, from a policy perspective, are reasonable, one hundred and twenty days for a case like the present. Most cases should take a day, a few two days or three days. There are very few complicated homicides. Most of them involve eye witnesses who are known at the time of the crime. One hundred days, therefore, is, from a policy perspective, reasonable and rational. The final positive is that once these periods are exceeded, the accused person or suspect has a right to be released with or without bail so that the state prosecutes when the accused person or suspect is not in detention. The positives for the state if sections 161A-J are made mandatory are that prosecution will be done quickly and speedily. Making sections 161A-J of the Criminal Procedure and Evidence Code motivates the state to be timely. The consequences, therefore, of making sections 161A-J of the Criminal Procedure and Evidence Code would be counterproductive and infringe many a right.

Sections 161A-J of the Criminal Procedure and Evidence Code further, enhance and preserve the right to freedom of movement, the right to liberty, the right to security and the right to presumed innocent unless proven guilty. Authors of Smith's Judicial Review of Administrative Action urge courts in considering the consequences of disobeying statutory provisions. To regard the provision's "significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Disobedience of the requirement that the accused or suspect should be in custody is not trivial or inconsequential matter where somebody is in custody for over one hundred and twenty days without prosecution. There is negligible, if any, inconvenience to the prosecution service if a prosecution has not been done in the 120 days. On the contrary, there would be blatant violation of the right to a speedy and timely trial. The right to release from detention is fundamental to our constitutional arrangements precisely because, if it were otherwise, innocent citizens would have to be in custody for long periods and only to be released for a long time. Where there is no statute to compensate such and citizens have to rely on precarious litigation to address damages that ensue malicious prosecution, release after the state has forfeited its privilege to prosecute while the suspect is in prison furthers international rendition of sections 42 (1)(d) and 42 (2) (e) of the Constitution according to international law (United Nations Standard Minimum Rules for the Administration of Non-Custodial Measures; (2) United Nations Standard Minimum Rules for the Administration of Juvenile Justice; (3) United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34 (November 29, 1985); (4) International Covenant on Civil and Political Rights 1966; (5) African Charter of Human and Peoples' Rights 1981; (6) African Charter on the Rights and Welfare of the Child 1990. Article 13 (1) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985 provides:

> Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

Article 13 (2) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985 provides:

> Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home

More importantly, the Criminal Procedure and Evidence Code, based on the words of Lord Woolf, MR, in *R. v. Immigration Appeal Tribunal, ex parte Jeyeanthan* and Lord Steyn Lord Cooke of Thorndon, Lord Clyde, Lord Hutton and Lord Hobhouse of Wood-borough in *The Attorney General's Reference* already provided for the consequences of non-compliance by requiring, if the court does not release the feely, to release at the request of the accused person on bail or the court acting *suo motu* or on information by the prosecution.

Release from detention on bail can only be in the interests of justice

The Supreme court in *Tembo and others v Director of Public Prosecutions* cites, with approval a passage from *S v Smith and Another*, (1969) (4) SA 175, 177 (N), a South African case. The statement is of general application. Harcourt, J. said:

> The general principles 'governing the grant of bail are that, in exercising the statutory discretion conferred upon it, the court must be governed by the foundational principle, which is to uphold the interests of justice; the court will always grant bail where possible, and will lean in favour of, and not against, the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby.

It must be that on the specific facts and circumstance about the crime the offender the victims and public interest considerations that a citizen continues in or is release or is released with or without bail. Considering the matter from perspective of interest of justice enables balancing public interest against a citizen's right to liberty and freedom even..

Section 42 (e) of the Constitution and Section 118 of the Criminal Procedure and Evidence Code

Sections 118 and section 161A-J of the Criminal Procedure and Evidence Code must be understood as the procedure and law for the aspect under section 42 (2) (e) Constitution that relates to release on bail. Practically, therefore, under section 42 (2) (e) of the Constitution, an accused person or suspect must apply for release from custody. The court could, in the interests of justice, grant release from custody. The court has two options: release without any condition or precondition – without bail. In this respect, the bail question does not arise. The court could, however, release the accused person or suspect on bail. The question here is not whether the accused person or suspect should be detained. The question is whether bail should be a condition or precondition for release.

The court, when considering whether release should be on bail, must, where it acts *suo motu,* have to inform the accused person or suspect that it is proceeding in this – onerous fashion – and the accused person may have to show that it is in the interests of justice to be released without this condition. In that case, the State must demonstrate that it is in the interests of justice that the release must be with this condition. Aware that the court will release without any conditions or preconditions the State could in turn request that the accused be released on bail. The state has to show that it is not in the interests of justice to release the accused person or suspect on bail. Conversely, the accused person or suspect will have t demonstrate that it is in the interests of justice to be released unconditionally.

More often, an accused person will predict that the court may not grant release. There are two options. The first is to combine the right to release under the Constitution and the statutory right under section 118 of the Criminal Procedure and Evidence Code. The second is to rely on the statutory right. Under the statutory right bail is granted, like under section 42 (e) of the Constitution, in the interests of justice because of the Bail Guidelines Act.

Section 118 of the Criminal Procedure and Evidence Code

Section 118 of the CPEC must not, therefore, be interpreted, if at all, as limiting the right. It is the tenor of section 118 of the Criminal Procedure and Evidence Code that the accused or suspect must be willing to give bail. Section 118 properly understood, sets the jurisdiction of the different strata of the judiciary. It certainly limits the jurisdiction of the subordinate courts. As The power of the court below, save for the procedural requirement, is limitless. The court below, where proceedings are in the lower court, can exercise the jurisdiction only after the lower court has. Apart from this, the court below can grant bail in all cases and for all manner of persons. Where under section 42 (2) (e) of the Constitution and section 118 of the Criminal Procedure and Evidence Code the accused person or suspect is willing to give bail, section 118 of the Criminal Procedure and Evidence Code does not prescribe the principles on which a court will grant bail pending trial.

Bail Guidelines Act

Until the Bail Guidelines Act, the principles were mesmerized from judicial decisions. The Bail Guidelines codifies some principles. The Act, in addition to codifying the common law, reiterates the introduction in the Constitution of the right to release from detention with bail. Section 2 of the Bail Guidelines Act, the application section, provides as follows:

> This Act shall apply to all criminal cases where the granting of bail is considered by the police and courts under section 118 of the Criminal Procedure and Evidence Code.

The Bail Guidelines, therefore, applies to application for bail in the court below and the lower court. The Bail Guidelines Act, however, follows the spirit of the right in section 42 (2) (e) of the Constitution. Part 2, rule 1 of the Bail Guidelines that provides:

> A person arrested for, or accused of, the alleged commission of an offence is entitled to be released, with or without bail, at any stage preceding his or her conviction in respect of the offence, unless the court finds that it is in the interests of justice that he or she be detained in custody.

Like section 42 (2) (e) of the Constitution, therefore, bail where it is applied for under section 42 (2) (e) or section 118 of the difference in the wording of section 42 (2) (e) of the Constitution and section Part 2, rule 1 of the Bail Guidelines of the Bail Guidelines Act that may be significant. Section 42 (2) (e) of the Constitution (on release on bail as opposed to release without bail) pretexts the interests of justice on unless "the interests of justice require otherwise." Part 2, rule 1 of the Bail Guidelines premises on that it is in the interests of justice "that he or she be detained in custody."

These are, *prima facie*, different concepts. Seen from the vista that under section 42 (e) of the Constitution, the right is to be released and that bail may be a condition for release of the suspect, section 42 (e) of the Constitution comports that when attaching the condition of bail, the court must do so in the interests of justice. In other words, requiring an accused person to appear on undertaking to do so must be in the interests of justice. In a majority of cases, therefore, the court would have to require the accused to be released on an undertaking to appear. It is in the interests of justice that the accused person should be released on such an undertaking. Where, therefore, the accused person is the one who requests bail, the onus and standard of proof are subsumed in that it is the accused person who requests for such an undertaking. The accused person, as an applicant, has an evidential burden to raise facts for entitlement to release – in the interests of justice. The burden then shifts to the state to demonstrate that it is not in the interests of justice to release the accused person. On the other hand where the court is acting *suo motu* to release the accused person or the prosecutor wants release of the accused person on such an undertaking, the onus will be on the prosecution to demonstrate that it is not in the interests of justice to release the accused person or the suspect on bail.

Part 2, rule 1 of the Bail Guidelines, however, premises release on bail on that it is in the interests of justice "that he or she be detained in custody. Under section 118 of the Criminal Procedure and Evidence Code, as seen, the accused person or suspect must be willing to give bail. If, therefore, the applicant does not apply for full release under section 42 (2) (e) of the Constitution and applies, under section 118 of the Criminal Procedure Code because there is willingness to give bail, the effect of Part 2, rule 1 of the Bail Guidelines is that an accused person or suspect, as the applicant, has to prove on balance of probabilities that it is in the interests of justice that the suspect should not be detained in custody. Conversely, if the prosecution is applying for release on bail, the prosecution must show that it is in the interests of justice that the accused person be detained.

Of course, that threshold is easily achieved by the presumption that every detention, unless justified, is *prima facie* unlawful. The justification, however, is also easily rebuttable at the mere suggestion that there is a crime whose author is the accused person or suspect. This, therefore, is a low threshold for the prosecution whose consequences are not a limitation on the right under section 42 (2) (e) of the Constitution but its denial or negation. The difference between the two thresholds bases on that section 118 sets a statutory right to bail which, unlike the right under section 42 (2) (e) of the Constitution, is not premised on the right to release.

Bail is actually given by the accused person and the court admits to bail

The constitution does not define the word "bail." The word is an ordinary word and even through used in a constitution which must be interpreted liberally and broadly, like all words, its meaning is a question of fact and understood from its ordinary use and meaning. The Oxford Dictionary defines bail as "the temporary release of an accused person awaiting trial, sometimes on condition that a sum of money is lodged to guarantee their appearance in court." Section 118 of the Criminal Procedure and Evidence Code, however, refers to when the accused person is "willing" to "give bail." It is the noun form, therefore, that is ruling. On this the Oxford Dictionary says "Money paid by or for someone in order to secure their release on bail." In *Uganda v Luzinda* [1986] HCB 33, Justice Okello defined bail:

> Bail is an agreement between the court and the applicant consisting of a bond with or without a surety with a reasonable amount as the circumstances of the case permit

> conditioned upon the applicant appearing before such a court on a date and time as named in the bond to start … trial.

The comport of sections 118 of the Criminal Procedure and Evidence Code, which uses the noun form, therefore, must be that, on condition that or suspect will appear at the trial, the accused person must be willing to deposit money for release from custody. Under all these sections, the accused person can have or not have sureties. Bail, therefore, is an undertaking by an accused person or a suspect to appear for trial at the time and place set. The accused or suspect must enter a bond to appear (section 119 of the Criminal Procedure and Evidence Code. The bond may or may not involve security or surety.

The Bail Guidelines Act, like the Constitution, does not define "interests of justice." The word used however is "interests" of justice, not 'interest' of justice. In *Rex v Hawken* (1944) DLR 116, Chief Justice Farris, said:

> The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted where the judge is satisfied that the bail will ensure the accused appearing for … trial

In *Rex v Monrovin* (1913) 3 Mann LR 582, the court said:

> Interest of justice requires that there be no doubt that the accused person shall be present to take his trial upon the charge in respect of which he has been committed

The Constitution and the Bail Guidelines Act, in using the word "interests" envisage that justice would be served by many interests. Restricting that interest to just one, namely, appearance at the trial may be helpful in order to limit the scope of the right but betrays other important interest which may serve justice. Consequently, the Bail Guidelines Act assumes a pragmatic approach, listing many principles and factors, they themselves not exhaustive that go to the interests of justice.

First, these principles and factors do not themselves resolve the question. They are, however, to be considered when deciding the question. For example, seriousness of the offence under section Part 2, rule (a) (i) of the Bail Guidelines does not comport that if the offence is very serious bail should not be granted. Conversely, it does not follow that bail will be granted as a matter of course for a less serious offence. Even for internal seriousness of the offence, the principles remain. In modern international criminal law and practice seriousness of the offence is not considered a factor. Our Bail Guidelines Act does. Secondly, there is, within a principle, room for considering factors other than those covered. All the principles have this provision requiring a court to consider "any other factor which in the opinion of the court should be taken into account."

Thirdly, in relation to each principle of factor, there is a balancing act between the interests of justice and the interests of the accused or suspect guideline 2 (6) of the Bail Guidelines Act provides:

> In applying the principles stated in this Part, the court shall weigh the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors—
>
> (a) the period for which the accused has already been in custody since his or her arrest;
>
> (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
>
> (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
>
> (d) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
>
> (e) the state of health of the accused, as certified by a medical practitioner; and
>
> (f) any other factor which in the opinion of the court should be taken into account.

Finally, the scheme of the Bail Guidelines Act is that the court granting bail must consider all these factors all the time and every time. Section 3 of the Bail Guidelines Act provides:

> In considering whether to grant or refuse bail, a police officer or a court, as the case may be, shall be guided by the principles, factors and other matters, constituting Guidelines on Bail, specified in the Schedule.

This is important. Given the right under section 42 (2) (e) of the Constitution and adumbrated by the Criminal Procedure and Evidence Code and the Bail Guidelines Act, the court is supposed to exercise judgment, balancing, as it should, the interests by the accused against the public interest. The word "judgment" is used advisedly. It is to avoid the consequence that the court is exercising discretion. I think that under section 42 (2) (e) of the Constitution, section 118 of the Criminal Procedure and Evidence Code and the Bail Guidelines Act the exercise is more than exercising discretion. In this regard Guideline 4 (2) of the Bail Guidelines, in relation to all principles and factors, requires that the court "should" consider them all:

> The principles which the court should take into account in deciding whether or not bail should be granted include the following …

Like when exercising discretion, it is incumbent on the court to consider all the principles. In *Salvado v The St*ate 2001 (2) BLR 411 (HC), Nganunu CJ, said

> Apart from the use of the word "very" in describing the exceptional circumstances required to grant bail in these cases, I respectfully agree with the learned judge. I should also agree with respect with the obvious fact that the grant of bail is an exercise of a judicial discretion. As in the exercise of all judicial discretions the court must take into account all relevant factors; and in my view, come to the conclusion that in all the circumstances there are exceptional circumstances requiring the court to suspend the serving of sentence until an appeal is heard.

In *S v Khumalo* (1957/2012) [2012] ZAKZPHC 27 (4 May 2012) In the Kwazulu-Natal High Court Murugasen,J:

> Mr Ntila has submitted that it is in the interests of justice that the appellant be granted bail. However there has been no address in this respect which is also fatal to the application and appeal. In exercising its judicial discretion, a court must consider the totality of the circumstances. *S v Stanfield* (1) SACR 221 (C) at 226 c – d

The expression 'interests of justice' implies that there are many and compounded and overlapping interests that conflate the pursuit of justice when considering the right to release where there should be an undertaking to give bail. Those interests are reflected in the many principles and factors now distilled in the Bail Guidelines Act. The principles are not to be overlooked; they are to be utilized. Consequently, failure to consider any of the principles or factors is error of judgment. Equally, it is error of judgment if any of these factors, in respect to a case, are exaggerated or undermined.

Under the scheme of the Bail Guidelines Act the applicants and the respondent must bring evidence and relevant information on one of them. This is to enable the court to exercise good judgment on the application. The Bail Guidelines Act requires, where the information is absent or inadequate, that the court, albeit under a duty to decide the application expeditiously, must adjourn for more and better information. It behooves the state and the applicant, therefore, to introduce to the court evidence and information on every of the considerations in section 4 and 6 of the Bail Guidelines Act. Part 2, rule 2 of the Bail Guidelines provides:

> In bail proceedings the court shall deal with such proceedings expeditiously but may postpone the proceedings to allow the accused or the prosecutor to adduce evidence or further information.

Part 2, rule 3 of the Bail Guidelines provides:

> If reliable or sufficient information is not before the court, the court may order its production.

The information requirement affects what has often been said in this court about where the burden of proof lies. Rule 1.1 (2) (f) of the Criminal Procedure Rules, for this court, provides:

> Dealing with a criminal case justly includes ... ensuring that appropriate information is available to the court when bail and sentence are considered.

The duty on a party is to provide information to the court. Where, therefore, the suspect or an accused person is applying for bail, there is a duty to provide full information on all the principles and factors covered in Guideline 2 (4) of the Bail Guidelines. The State has the same duty.

Certainly, in the scheme of the Bail Guidelines Act, the court should consider a bail application in the prism of all the principles and factors in Part 2, rule 4 and the considerations in Part 2, rule 6 of the Bail Guidelines. From the scheme of the Act as in the guidelines, the duty on both the applicant and respondent to provide more and better information for proper exercise of the judgment is paramount and necessary. The Bail Guidelines Act, and by extension, the Bail Guidelines, codify some aspects of the common law. The practice and law on bail is, however, now essentially statutory. Since the Bail Guidelines Act, it is incumbent on the court when exercising judgment to grant bail to checklist all matters in the Guidelines and require parties to present information on all aspects of the guideline. Applications wanting in this respect should be adjourned to ensure more and better information is before the court.

In this case, the court below acted without evidence or information on most principles and factors it considered and, with or without information, completely overlooked other factors. According to regulation 4 (a) of the Bail Guidelines Regulations, the court should have first considered the likelihood that the accused, if released on bail, will attempt to evade his or her trial. The court below made no determination. Nowhere in the judgment does the court determine that it was the case that the appellants would, if released, abscond and not show up at the trial. Besides, this was just an assertion by the state. The state's affidavit on the matter just states that there is honest belief. The state's affidavit does not show the basis of this 'honest belief'. On the other hand, the appellant's affidavit shows that some appellants were minors and lived with parents. Others also lived in the same place with relations and friends. They therefore had a permanent place of abode. Moreover, there were sureties who wanted to vouchsafe the appellant's presence at the trial. The prosecution's honest belief was unfounded. The appellant's evidence and information lean against them absconding. Of course the court considered the seriousness of the offence (Part 2, rule 4 (a) (i) of the Bail Guidelines). It, relying on, *Mpasu v Republic* (2003) Miscellaneous Criminal Application No 38 (MHC) (PR) (Unreported) opined, correctly, that the more serious the offence the higher the temptation to evade or avoid trial.

There is, however, the outward seriousness of the offence and the internal. The outward seriousness is determined by the legislature and manifested by the sentence it prescribes for the offence. Offences, therefore, that attract the death penalty or life imprisonment are serious offence generally and outwardly. The court, therefore, when considering whether to grant bail must regard the internal seriousness of the offence as committed. Murder is a serious crime; not all murders are of the similar seriousness. Lower degrees of a crime have not to be treated in the same way as serious instances of a crime. The court below concluded that this was a grave manner of crime. The court below also regarded the relative strength of the parties citing the case of the court below of Langton *v Republic,* (2008) Miscellaneous Criminal Application No 148 (MHC) (PR) (Unreported) for the proposition that the stronger the case, the higher the temptation to escape Part 2, rule 4 (a) (ii) of the Bail Guidelines. The court below never, on this head, considered the nature and the severity of the punishment which is likely to be imposed should the accused be convicted of the offence against him or her (Part 2, rule 4 (a) (iv) of the Bail Guidelines; the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried (Part 2, rule 4 (a) (v) of the Bail Guidelines); (vi) the assets held by the accused and where such assets are situated (Part 2, rule 4 (a) (vi) of the Bail Guidelines); the means and travel documents held by the accused which may enable him or her to leave the country (Part 2, rule 4 (a) (vii) of the Bail Guidelines); the extent, if any, to which the accused can afford to forfeit the amount of bail which may be fixed, thereby inducing him or her to jump bail (Part 2, rule 4 (a) (viii) of the Bail Guidelines); whether the extradition of the accused could readily be affected should he or she flee across the borders of the Republic in an attempt to evade his or her trial (Part 2, rule 4 (a) (ix) of the Bail Guidelines); or other factors, concerning the principle, which in the opinion of the court should have been taken into account.

The court below, equally never considered that the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence. The court below, therefore, never considered the fact that the accused was familiar with the identity of witnesses and with the evidence which they may bring against him or her (Part 2, rule 4 (b)(i) of the Bail Guidelines); whether the witnesses had already made statements and agreed to testify (Part 2, rule 4 (b)(ii) of the Bail Guidelines); the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated (Part 2, rule 4 (b)(iii) of the Bail Guidelines); whether the investigation against the accused had already

been completed (Part 2, rule 4 (b)(iv) of the Bail Guidelines); how effective and enforceable bail conditions prohibiting communication between the accused and witnesses were likely to be (Part 2, rule 4 (b)(v) of the Bail Guidelines); whether the accused had access to evidentiary material which is to be presented at his or her trial (Part 2, rule 4 (b)(vi) of the Bail Guidelines); the ease with which evidentiary material could have been concealed of destroyed (Part 2, rule 4 (b)(vii) of the Bail Guidelines); the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings (Part 2, rule 4 (b)(viii) of the Bail Guidelines); or any other factor on this principle which in the opinion of the court should be taken into account.

The court below considered the principle that the accused, if released on bail, would endanger the safety of the community or any particular person or will commit an offence (Part 2, rule 4 (c) of the Bail Guidelines). The court in considering this principle may, where applicable, consider the degree of violence towards other implicit in the charge against the accused (Part 2, rule 4 (c) (i) of the Bail Guidelines). The court below, however, never took into account if the accused had made any threat of violence to any person (Part 2, rule 4 (c)(ii) of the Bail Guidelines); if the accused persons had any resentment against any person (Part 2, rule 4 (c) (iii) of the Bail Guidelines); the accused persons had any disposition to violence in the past (Part 2, rule 4 (c)(iv) of the Bail Guidelines); or any other factor which under this principle in the opinion of the court should have been taken into account.

The court below considered Part 2, rule 4 (b) of the Bail Guidelines that in special circumstances, the likelihood that the release of the accused will disturb the public order or undermine the public peace or security. In considering this principle the court may consider whether the nature of the offence or the circumstances under which the offence was committed was such that the release of the accused was likely to induce a sense of shock or outrage in the community where the offence was committed, and whether the shock or outrage in the community where the offence was committed, and whether the shock or outrage of the community could, were the accused persons to be released (Part 2, rule 4 (d)(i) of the Bail Guidelines). The court, however, never considered whether the safety of the accused persons was by their release (part 2, rule 4 (c) (ii) of the Bail Guidelines) undermined. There is reference, because of Part 2, rule 4 (c) (iii) of the Bail Guidelines, to whether the sense of peace and security among members of the public would be undermined or jeopardize by the release of the accused. The court below, however, overlooked considering whether there were special circumstances for the application of the principle. Part 2, rule 4 (d) (iii) of the Bail Guidelines provides:

> The principles which the court should take into account in deciding whether or not bail should be granted include … in exceptional circumstances, the likelihood that the release of the accused will disturb the public order or undermine the public peace or security; and in considering this principle the court may, where applicable, take into account the following factors—
>
> (i) whether the nature of the offence or the circumstances under which the offence was committed is such that the release of the accused is likely to induce a sense of shock or outrage in the community where the offence was committed, and whether the shock or outrage of the community might lead to public disorder if the accused is released;
>
> (ii) whether the safety of the accused might be jeopardized by his or her release;
>
> (iii) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused; and
>
> (iv) any other factor which in the opinion of the court should be taken into account.

The court below was oblivious to that, as a matter of principle, it was supposed to do a balancing act, weighing the interests of justice against the right of the appellants personal freedom and, specifically, the prejudice the appellants were likely to suffer if they were to be detained in custody (part 2, rule 6 of the Bail Guidelines). The court below, was to consider (a) the period for which the appellants were already in custody since arrest (Part 2, rule 6 (a) of the Bail Guidelines); the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail (Part 2, rule 6 (b) of the Bail Guidelines); the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay (Part 2, rule 6 (c) of the Bail Guidelines); any impediment to the preparation of the accused person's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused (Part 2, rule 6 (d) of the Bail Guidelines); and the state of health of the accused, as certified by a medical practitioner (Part 2, rule 6 (e) of the Bail Guidelines).

Specifically, the court below under, regulation 2 (6) (e) was supposed to weigh the interests of justice against the right of the appellants to their personal freedom and in particular the prejudice they were likely to suffer if they were to be detained in custody, taking into account, where applicable, the state of health of the accused, as certified by a medical practitioner. It was not enough that the court thought that the appellants' release was likely to endanger the safety of the community and that the appellants were likely to commit further offences. Moreover, the court concluded that the appellants' release would likely disturb the public order and undermine public peace and security without investigating and finding the exceptional circumstances for this consideration.

Moreover, some appellants were, known to the court below, minors, yet the court below never considered the principle in (Part 2, rule 5 of the Bail Guidelines). Where the accuses is a juvenile, the court below was supposed additionally to, and it never did, consider the welfare of the juvenile (Part 2, rule 5(a) of the Bail Guidelines); and whether it was necessary in the interest of the juveniles to remove them from association with any undesirable person; (Part 2, rule 5(b) of the Bail Guidelines) and whether the release of the juveniles would have defeated the ends of justice (Part 2, rule 5(c) of the Bail Guidelines).

There was evidence that the appellants were in custody for over ninety days since arrest. The appellant were at the time of hearing the appeal in custody for over 120 days since arrest. Apart from not considering Part 2, rules 6 (a) and (b) of the Bail Guidelines), the court never considered sections 161 A to J of the Criminal Procedure and Evidence Code.

Failure by the court below to consider all principles and factors which, under the Bail Guidelines, should be considered is an error of judgment or improper exercise of discretion. The Supreme Court of Appeal, sitting as a full court, would either allow the appeal based on this failure or, if the custody time limit had not expired, remit the case for to the court below to have more and better information to exercise the power properly. The custody time limits are to be obeyed by prosecutors and the courts. It is just unfortunate that the Registrar of the High Court failed to set the trials for the cases. I cannot even phantom an explanation for this. This neglect cannot justify the detention of accused persons beyond the custody time limits. Where custody time limits are exceeded the court has no discretion in the matter where that discretion is to further detain the accused person. The only discretion is to release the accused person and the further discretion whether the accused should be released absolutely or on the accused person giving bail. It is not mandatory to release the accused on bail – in the sense that the accuse person must be released on an undertaking to appear with or without sureties.

Bail is granted pending an appeal before the full court. There is a real likelihood that the appeal before a full court against refusal for bail would succeed because the court below overlooked certain pertinent principles and factors in the Bail Guidelines. The case is remitted the case to the judge in the court below to consider with counsel imposing such conditions as are envisaged in section 119 of the Criminal Procedure and Evidence Code. The court below should closely regard Article 13 (2) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985. The Registrar of this court must set down the bail application before a full court.

Made this 11th Day of January 2017

Mwaungulu JA

JUSTICE OF APPEAL