

riminal Application No. 66 of 2019 MzHC



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY: CRIMINAL DIVISION
Miscellaneous Criminal Application No: 66 of 2019

Modester Kanyinji

The Republic

CORAM:

HONOURABLE JUSTICE D. A. DEGABRIELE

Mr. W. Nkosi

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Official Interpreter

Mrs. J. N. Chirwa

Court Reporter

DeGabriele, J

ORDER ON APPLICATION FOR DISCHARGE

1 . Introduction

1.1. This is an application for discharge and release from custody. The application is made pursuant to section 42(1)(f) section 42(2)(e) of the Constitution of the Republic of Malawi (hereinafter referred to as the "Constitution"); section 161 E

F and G as read with section 302A of the Criminal Procedure and Evidence Code (Cep 8:01) Of the Of Malavvi (hereinafter referred to the CP&E and section 118 of the CP&EC.

| 9. The Applicant is Modester Kanyinji, who is 50 years old. She was arrested on 13 March 2017 for causing the death of her aunt Chrissy Longwe. She comes from James Saka village, Traditional Authority Mzukuzuku in Mzimba District. The brief facts as presented by herself were that on 13 March 2017 she killed her aunt, but does not remember what weapon she used. The Applicant states that she has mental issues. The Applicant was taken to court on 5 May 2017 where she was committed for trial in the High Court. At the time of the Application she had been in custody for 33 months at the time of hearing this application. The Applicant is seeking to be discharged and be released on bail because she does not know when her trial will commence. The Applicant has four (4) children. She has mental challenges and was receiving medication from St John of God in Mzuzu. The Applicant intends to return to her village once released.

1.3. The State, in its affidavit in response confirmed that the Applicant was arrested in May 2017 for the offence of homicide. The State opposes the application for discharge stating that the application relies on laws that have to do with bail application. The State further argues that the proper application should have been for bail consideration. However, the State concedes that if the Applicant seeks to be considered for bail, the State would not object to his being granted bail since the pre-trial custody limits have been exceeded.

1.4. The Court notes that the Applicant herein has mentioned her mental illness and treatment plan. However, both Counsel for the Applicant and Counsel for the State have not provided further information on the same. This Court would like to remind both counsel that in any application before a court of law, that touches on the health of an accused person, counsel are duty bound to present the court with as much information on the health issues, with sworn affidavits from medical personnel. This aids the Court in coming up with a better determination on the issues of health in the process of considering whether or not the Applicant can be released from custody with or without bail.

2. Issues for determination

2.1. The questions the Court has to determine are;

2.1.1. Whether or not the Applicant should be discharged and released from custody;

2.1.2.If not, whether or not the Court can grant bail in these circumstances

3. The Law and analysis of the application

3.1. The right of access to justice and legal remedies is recognized in section 41 of the Constitution. The same right is widely acknowledged under the international human rights framework, like the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the African Charter on Human and People's Rights (1986). These conventions demonstrate that access to justice and human rights protection is linked to the fact that all persons have a right to access courts of law and seek legal remedies against any breach and violations of fundamental rights. Addressing breaches of these fundamental rights must be done by the State which has an obligation to ensure expeditious and timely disposal of all matters concerning any breach or violation of fundamental rights; and in this case the right to liberty as enshrined in section 18 of the Constitution. Therefore, when there are undue delays in commencing trial, an accused person is not only entitled to seek bail before a court of law, but can also seek other legal remedies to address violations necessitated by the delays commencing trial.

3.2.In this case, the Applicant has been accused of committing the offence of murder contrary to section 209 of the Penal Code. The law requires that he be brought to book through a proper and timely trial, and if found guilty, he be punished in accordance to the law. However, the Applicant herein has been deprived of his liberty since he was committed to the High Court for trial in May 2017. There is nothing in the submissions by the State indicating when the State will bring the case for trial. The absence of such information is indicative of the fact that the State had "forgotten" the case of the Applicant. Even though she has been committed to the High Court for trial, she has not been produced to a court of law on a regular basis to be informed of when such a trial would commence, or for plea and directions during the 33 months-period after her committal.

4.The constitutional right to be released from detention or without bail

4.1 According to the Constitution, any arrested person has guaranteed rights that cover the process of arrest, trial, access to justice, personal liberty and the right to be tried timely Failing which, an accused person has a right under the Constitution to be released from detention with or without bail.

4.2. The Applicant has cited section 42(1)(f) of the Constitution which provides that

"Every person who is detained, Including every sentenced prisoner, shall have the right-

(f) to be released if such detention is unlawful"

In this case, the detention of the Applicant was lawful as it was sanctioned by an independent, impartial and competent court of law in May 2017, when the Applicant was charged with the offence of murder contrary to section 209 of the Penal Code; and was subsequently committed to the High Court for trial.

4.3. Further, the Applicant has cited section 42(2)(e) of the Constitution which states that;

"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-

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

The Applicant herein has stayed on remand for a long period of time after being committed for trial. Under the law, the Applicant as an accused person has a right under Section 42(2)(e) of the Constitution to be released from custody with or without bail unless the interest of justice require otherwise. The Malawi Supreme Court of Appeal held in *The Republic v Fadweck Mvahe*, MSCA Criminal Appeal No. 25 of 2005 (unreported) that;

....the High Court has power to release on bail a person accused of any offence including murder. We have indicated also that it is common case that the right to bail stipulated in section 42(2)(e) of the Constitution is not an absolute right; it is subject to the interests of justice. To use the precise words in the Constitution, every person arrested for, or accused of, the commission of an offence shall, in addition to the rights which he has as a detained person, have the right to be released from detention, with or without bail, unless the interests of justice require otherwise. We have further stated that it is also common case that the burden lies on the State to show that it would not be in the interests of justice to grant bail to a murder suspect

4.4. While section 42(2)(e) of the Constitution as read with section 118 of the

CP&EC gives the accused person a right to be granted bail, on the court's own motion or on application by the accused, such granting of bail is in the discretion of the court, guided by the interests of justice. It is for the Applicant to apply to court for bail and for the State to show by evidence that granting bail would defeat the interests of justice. Therefore, the burden rests on the State which must give reasons in support of the assertion. In this case, the State has registered no objections to the application for bail and there is nothing on the record to show that it would not be in the interest of justice to grant bail to the Applicant.

4.5. It must be emphasised that the granting of bail is to ensure and secure the accused person's attendance to his / her trial. The law under section 3 of the Bail (Guidelines) Act and some decided cases have outlined issues that the court will consider in determining whether or not it is in the interests of justice that bail be granted. These issues and factors include, but are not limited to;

- a) the likelihood of the accused person attending his/her trial,
- b) the risk that if released on bail the accused person will interfere with the prosecution witnesses or tamper with evidence, especially in cases where the investigations are still on-going or the trial is in progress and the evidence of certain witnesses is crucial,
- c) the gravity of the offence, the likely punishment on conviction and the likelihood of his committing another offence or other offences and also the risk to the accused person,
- d) The health of the Applicant or the risk of harm to his/her person if granted bail and returns to his village where the deceased's relations may harm him.

Since there is no objection from the State as to whether or not it is in the interest of justice that bail should not be granted, it is the conclusion of this Court that the Applicant herein can be released from custody with bail.

5. Pre Trial Custody Time Limits

5.1 . The Applicant has argued that the pre—trial time limits have been exceeded and as such the State has violated the right of the Applicant to a fair and speedy trial.

5.2. This Court notes that under section 161 of the CP&EC the law allows for an accused person to be held in lawful custody in relation to an offence while awaiting the commencement of his/her trial. However, the law limits the time for such pre-trial custody. Further, according to section 161B of the CP&EC, the custody must be "lawful custody", which is sanctioned by a court order pending trial. The compliance with time limits at the pre-trial stage is critical because delays in commencing criminal proceedings amounts to conduct on the part of the prosecution which is oppressive, unfair and unjust. It therefore falls on the courts to interpret and apply the law with a view to reduce delays at the pre-trial stage, as well as protect the presumption of innocence until proven guilty by a competent court of law,

which is accorded to every accused person throughout the whole trial process by section 42(1)(f)(iii) of the Constitution.

5.3. The Applicant also cited sections 161E, F and G as read with section 302A of the CP&EC as being violated by the State. These sections read as follows:

"161E: The maximum period that a person accused of an offence triable in the High Court may be held in lawful custody pending his committal for trial to that Court under Part VIII or Part IX of this Code in relation to that offence shall be thirty days. 161F: Where a person accused of an offence triable in the High Court is committed to the High Court for trial, the maximum period that he may be held in lawful custody pending commencement of his trial in relation to that offence shall be sixty days.

161G: The maximum period that a person accused of treason, genocide, murder, rape, defilement and robbery may be held in lawful custody pending commencement of his trial in relation to that offence shall be ninety days

302A: 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".

6.4. The law envisages scenarios where trial may not commence within 90 days

— As such, section 161 H allows the prosecution, at least seven days before the expiry of the pre-trial custody time, to make an application to the High Court for an extension. However, the extension can only be granted for a period not exceeding 30 days and the court must be satisfied that there is good and sufficient cause for doing so. This means that the maximum pre-trial custody time for homicide offences is 120 days. The law sets down these strict limitations on pre-trial custody to ensure that those accused of serious offences like homicides, treason, etc, are not inadvertently left in custody as a "punishment" due to the gruesomeness or seriousness of the offence they have committed. Failure by the State to adhere to these limits is tantamount to punishing the accused person before s/he is found guilty by a court of law.

5.5. The courts are enjoined by the law under section 161I of the CP&EC that at the expiry of a pre-trial custody time limit or of any extension that has been granted 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 in line with section 118(3) of the CP&EC. In the exercise of discretion in such instances, the courts tend to grant bail as a matter of course, without, however, losing sight to the interest of justice.

Caution must be sounded here that the exceeding of pre-trial custody time limits does not in itself mean that an accused person can automatically be granted bail. Conversely, the objection by the State to the granting of bail does not mean that the accused person will not be granted bail. The granting of bail remains in the discretion of the court having considered the interests of justice.

5.6. Sections 161 A-J of the CP&EC clearly limit how long a person should be in custody before commencing proceedings. They create, where the State wants to prosecute a person while in lawful custody, a duty to commence the proceedings within the maximum time limits or the statutory extended time. The burden still remains on the State to show cause, and demonstrate within the 90 days, and/or the added 30 days that the person cannot be granted bail. Consequently, the accused person must be prosecuted expeditiously.

5.7. It must be stated here that delays in bringing cases to trial has been identified as one of the impediments to the efficient administration of justice, which the governance sector reforms must address. Often times, there is a great lament by all stakeholders in the criminal justice sector in regard to inadequate resources, including human resources, financial resources and tools of trade to allow the sector to perform and deliver in accordance with the law.

Therefore, where pre-trial custody limits have been exceeded, it does not matter for what reasons; be it the lack of diligence in investigating and prosecuting the matter, lost dockets, un-concluded or ongoing investigations; the criminal justice cannot afford to continue with the victimisation of accused persons or the disregard of their constitutional rights.

5.8. There is no excuse for the State to fail to bring the matter for trial, or to seek an extension of the time limits before a competent court of law, which include subordinate courts, at least presided over by a professional magistrate. This Court agrees with the sentiments that were stated by Justice Mwaungulu as he was then in the case of Republic v Khasu (Misc Criminal Application No. 61 of 2003) (unreported) that;

"State organs cannot, however, avoid constitutional duties and responsibilities under the section because of administrative or financial difficulties. The weight a democratic constitution attaches to the citizen's

rights should, in my judgment, be matched with prioritising and desire to attain efficiency levels that uphold and promote rights

This therefore should compel the Court, when faced with such cases, to grant the accused person bail either on its own motion or on application pursuant to section 118(3) of the CP&EC. However, and regardless of whatever orders courts make, it remains the primary responsibility of the State to provide resources so that State institutions in the criminal justice sector can fulfil their obligations as outlined by the Constitution.

5.9. In the management of criminal justice, every person who is accused of an offence, arrested and charged of that offence is to be presumed innocent until proven guilty by a court of law. Further, such practice of keeping persons accused of homicide demonstrates inhumane and degrading conduct on the part of the State, as the right to be presumed innocent until proven guilty by the court of law is negatively affected. Delays in commencing trial for homicide cases, whether the delays occur before a formal charge is made, before committal to the High Court, or after committal to the High Court, breach the principle of the presumption of innocence, because, it seems to the accused and the public at large that the accused person is guilty and she ought to be left in custody as punishment.

6. Conclusion

6.1. It is clear that the rights of the Applicant herein were violated by the State. There is no justification whatsoever for the State's failure to act within the parameters of the law. In a case where Applicants were held on pre-trial detention for over 2 years, the Malawi Supreme Court of Appeal did not discharge the Applicants from the offence, but released them from custody with bail, see *Frackson & Others v Republic (Order) (MSCA Criminal Appeal No. 1 of 2018)*(unreported). Likewise, the Applicant herein shall, in the interests of justice, be released on bail on the conditions set below.

6.2. The Applicant, Modester Kanyinji, is hereby granted bail on the following conditions;

- 1 . The Applicant must be bound by a non-cash bond of MK10,000.00 and a copy of her national identification card must be placed on the court file. The Applicant can only be released into the hands of a capable guardian to facilitate the medical and mental assessment;
- 2 The Applicant must produce and have two honest and reliable sureties with integrity, who are related to her by blood or marriage, bonded at MK40,000.00 each, NOT CASH, and copies of the national identification card of each surety must be placed on the court file;
- 3 That the suitability of the said sureties will be examined by the Registrar of this court not later than 7 days from this order;
- 4 The Applicant must report to the Officer-in-charge of the nearest police station within 7 days of her being discharged from custody and thereafter once every fortnight, on Mondays before 12 noon. Details of the nearest police station must be given to the Registrar of the court at the surety assessment hearing;
- 5 The Applicant should not leave the District, village and jurisdiction where she resides without informing the Officer-in-Charge of the said nearest police station as aforementioned, and without informing her sureties of her destination and the duration of her stay there;

of

- 6 The Applicant should surrender any travel documents that she may have to the Officer-in-Charge of the said nearest police station as aforementioned, or to the High Court;
- 6.3. The Court orders that a medical and mental health assessment be carried out by the State and the report be filed with the Court before the plea and directions hearing, but to be carried out within 14 days of this ruling.
6. 4.Since the State has failed to show cause why trial for the Applicant has not commenced, this Court will, in the interests of justice set down the matter for trial.
- 6.5. The State must bring the Applicant before the High Court for plea and directions within 30 days from the date of this ruling, failing which the Court should, on its own motion or on application by the Applicant, dismiss the charges forthwith.

It is so ordered.

Made in Chambers at MZUZU REGISTRY this 5th day of August 2020


D. A. DeGabriele

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