



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL CASE NO. 9 OF 2022**

**(Being Criminal Case No. 407 of 2022 before the Chief Resident Magistrate Court sitting at Blantyre)**

**DICKSON GIFT MLELEMBBA**

**V**

**THE REPUBLIC**

**Coram: Justice Vikochi Chima**

**Mr Kumpita, Counsel for the Appellant**

**Ms Layna Kulesi, Senior State Advocate**

**Mrs Moyo, Court Clerk**

**ORDER ON APPEAL**

**Chima J**

1. This is an appeal against the bail denial decision that the Chief Resident Magistrate court made on 27 April 2022. The accused had made two bail applications before the magistrate court. His first application was made on the day he took plea. When that one was denied, he reapplied for bail a few days later before the magistrate court and the application was again rejected. The accused now appeals against that decision claiming that the magistrate had not considered the change in the circumstances of the case since the last application had been made: that the witnesses the prosecution feared he (the accused) would interfere with had by then already testified before the court.
2. On 21 March 2022, Dickson Mlelemba, aged 44 years, was charged before the Senior Resident Magistrate Court with defilement contrary to section 138 of the Penal Code. It was alleged that the accused, on 3 February 2022, at Njamba Park in the city of Blantyre had unlawful carnal knowledge of the victim, a girl under the age of sixteen years of age.

He pleaded not guilty to the charge. Having denied the charge, the state asked for the accused to be remanded in prison for seven days while they concluded their investigations. The prosecution stated that they were at that time trying to obtain call logs from the service providers as part of their investigations.

3. The state gave two main reasons why they wanted the accused to remain in custody. The first was said to be that the accused and the victim and the other prosecution witnesses live close by in Baluti and that there was possibility of the accused interfering with the witnesses.
4. The state had explained that after the victim had reported the alleged offence to the police, the accused had promised to pay her K100, 000 if she allowed him to destroy her phone (which allegedly contained some evidence) and also if in court she denied the allegations.
5. The state also claimed that the accused appeared to be a flight risk for it was said that after the alleged commission of the offence, the accused was at large and was only arrested on 17 March 2022.
6. Despite these claims, counsel for the accused, however, still applied to have the accused released on bail stating that the accused is a laboratory technician at Chancellor College and that he has a permanent place of abode at Baluti. Counsel also narrated the circumstances of the accused's arrest. He stated that the police had been to the accused's house but had not found him there and that they therefore left their phone numbers at his house. The accused, then, had called the police and told them that he would be back in town and would go to Manase Police Station on 16 March 2022. He stated that the accused was then arrested when he presented himself at the police station. Counsel also stated that the accused had before this arrest never been arrested before, that the accused had no travel documents and that in all the circumstances of the case, the accused was not a flight risk. It was counsel's submission that courts do not condone police officers arresting before the conclusion of investigations.
7. The prosecution objected to the grant of bail stating that on the date that the defence claimed the accused presented himself to the police, 16 March 2022, that it was the very day the victim claimed the accused had tried to persuade her to change her story. The state asked to swear an affidavit to depose to these matters. The court granted the prosecution that chance and the defence was also given time to file an affidavit in reply if they were so minded. The court set the 24<sup>th</sup> day of March 2022 (later changed to 25<sup>th</sup> March 2022) as the date for the further hearing of the application. On 25<sup>th</sup> March 2022, the matter was heard and the decision on the bail application was reserved until the 31<sup>st</sup> of March 2022, the date trial was to commence.
8. On that scheduled date, four witnesses, comprising the victim, the victim's mother, the victim's friend and a medical officer testified before the Senior Resident Magistrate Court. The prosecution only remained with one witness to testify, the police investigator. The magistrate delivered his ruling on bail having heard these testimonies. He declined to grant the bail. The court below reasoned that despite the fact that the fear of the accused

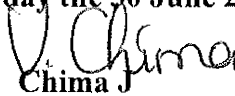
interfering with the witnesses having been displaced (since the witnesses to whom this fear related had already testified) there were other considerations which made the court uneasy that the accused would likely abscond bail. The court stated that given the nature of the charge and the consequences that were to follow if the accused were to be convicted, the accused may jump bail because the evidence that had been heard so far was adverse to him. Further, the court stated that this fear was heightened by the evidence of the victim to the effect that after the matter had been reported to the police, the accused had offered her money in order for her to recant in court what she had reported to the police.

9. After the delivery of the ruling, the matter was adjourned for further hearing to 5 April 2022. On that date, the police investigator testified before the same Senior Resident Magistrate Court and the prosecution closed its case. After this, counsel for the accused reapplied for bail arguing that there was no fear of the accused interfering with the prosecution witnesses. Further, counsel submitted that according to the evidence, the defence felt that it had not been established that the girl was under 16 years of age at the time the alleged offence occurred, but rather that she must have been 18 years of age (counsel stated that he would be making written submissions of no case to answer on this front). Counsel also submitted that he had already advised the accused that the prosecution having failed to establish this element of age that it was going to be pointless for the accused to jump bail were he to be granted the bail. He also submitted that he had known the accused since the year 1991 when the two were in High School together. The Senior Resident Magistrate adjourned the matter for the ruling of whether there was a case to answer or not.
10. On 27 April 2022, the court (by then the Chief Resident Magistrate had taken over the matter) still denied bail to the accused based on the same reasons that the Senior Resident Magistrate court had given in its earlier ruling. The court made a finding of a case to answer on 3 May 2022.
11. Firstly, let me note that it is curious that counsel for the defence was bringing to the attention of the court that he personally knows the accused and that he had known him for some twenty years. That is uncalled for. While counsel is supposed to be a zealous advocate for his client, he cannot stand as his surety and so he cannot vouch for his client's truthfulness or integrity.
12. Secondly, I further find it strange that counsel for the defence could be reapplying for bail at the stage that he made the reapplication when one considers the reasons the court gave for bail denial on the original bail application. The denial of bail on the original bail application had in essence stated that the evidence was not favourable to the accused. This was after four of the prosecution witnesses had testified and only one witness, the investigator remained. Now, to reapply for bail after the investigator, the final prosecution witness, had testified, when the investigator brought no real new evidence but essentially just a rehash of what the earlier witnesses had stated, seems to me futile. A bail reapplication in the same court after the earlier one was denied can only be made when

there has been a change of circumstances since the last application.<sup>1</sup> In this case, counsel for the defence had not demonstrated such change of circumstances.

13. Considering the reasons for bail denial on the original bail application, I am at a loss to fault them for the reasons for denial are legal and cogent. Thus the appeal is dismissed.
14. The accused was already found with a case to answer. The trial has been moving at a reasonable speed. Let the Chief Resident Magistrate court maintain the same pace and dispose of the matter according to law.

**Made this day the 30 June 2022**

  
Chima J

---

<sup>1</sup> Section 10 of Part II of the Schedule to Bail Guidelines Act,