Fadweck Mvahe v Republic

Court:	Supreme Court Of Appeal
Bench:	His Honourable Justice L Unyolo, The Honourable Justice J Kalaile SC JA, The Honourable Justice Mtegha, SC, JA, The Honourable Justice Mtambo, SC, JA, The Honourable Justice Tembo, SC, JA
Cause Number:	MSCA Criminal Appeal number 25, 26 and 27 of 2005
Date of Judgment:	November 16, 2005
Bar:	Mr. Chiphwanya, Counsel for the Applicants Mr. Mtata, Counsel for the Respondent

Summary

The Appellants appealed to the Malawi Supreme Court of Appeal against the High Court's refusal to grant them bail after being charged with murder. The three separate appeals were consolidated due to their similar nature and the common issues raised. The High Court had refused two of the applications on the grounds that the accused had failed to show exceptional circumstances, while the third was refused as it would not be in the interests of justice to grant bail. The central legal issue was the correct interpretation of the constitutional right to bail under section 42(2)(e) of the Constitution in relation to murder suspects, and whether the requirement to prove "exceptional circumstances" was a valid limitation on that right.

The Court noted that there were two conflicting views on the matter from previous Supreme Court decisions. One view, from *McWilliam Lunguzi v The Republic*, held that the discretion to grant bail for murder suspects is rarely exercised and only upon proof of exceptional circumstances. The other, from *John Tembo and 2 Others v the DPP*, held that courts have a real discretion to grant bail unless the interests of justice would be prejudiced, with the onus on the State to prove this.

The appeals were allowed. The Court held that the constitutional right to bail is not absolute but is subject to the interests of justice, and that the burden is on the State to prove that it would not be in the interests of justice to grant bail. The Court found that the requirement for murder suspects to prove "exceptional circumstances" was an unconstitutional approach and should no longer be followed. The Court clarified that the "exceptional circumstances" test is only applicable to applications for bail after conviction. The Court directed the Appellants to bring fresh bail applications to the High Court to be dealt with under the new procedure pronounced in this judgment.

Legislation Construed

- Constitution of the Republic of Malawi (s 42(2)(e))
- Penal Code (s 209)
- Criminal Procedure and Evidence Code (s 118)
- Statute Law (Miscellaneous Provisions) Act (s 16(6)(a)(iii))

Ruling/Judgment

1. As will be seen from the above, we have three separate appeals in this matter but since they raise the same issues, and the same counsel represent the appellants and the respondent in all the three appeals, it was agreed that we

should consolidate them and hear them together, which we did.

2. It is instructive that we state briefly the facts of each case. In Criminal Appeal Number 25 of 2005, in which the appellant is Fadweck Mvahe, the appellant, aged 18 years, stands charged with the offence of murder contrary to section 209 of the Penal Code. He is accused of causing the death of his sister in March, 2004. Consequent upon his being arrested on the said charge he made an application for bail before the High Court. In the affidavit in support of the application it was deposed that at around the time his said sister was found dead at what was referred to as a "***dambo***", the appellant left the village for Chingale in Zomba District where he had found employment at a farm there. It was further deposed that the appellant was arrested in connection with his sister's death five days after returning to his home from Chingale in March, 2005. The appellant deposed that he is married and has two children, and resides with his family in the village where he has built a house and does subsistence farming. He deposed that there was no way he would abscond and that if he were such a person he would not have returned to the village upon the termination of his employment at Chingale. He prayed that he be granted bail.

3. The State was duly served with the application, but although it filed an affidavit in opposition, it did not appear at the hearing of the application. In the affidavit in opposition the State simply said that since murder is a very serious offence, bail should not be granted to the appellant.

4. The court below refused the application, and bail was not granted, on the ground that the appellant did not show exceptional circumstances to entitle him, a murder suspect, to bail. The order was made by Chipeta, J.

5. We now turn to Criminal Appeal Number 26 of 2005 in which the appellant is Richard Chigeza. In this matter the appellant also stands charged with the offence of murder contrary to section 209 of the Penal Code. He is accused of

causing the death of one Mr. Mtewa on 25th March, 2005. Upon being arrested on the said charge the appellant made an application for bail before the High Court. In his affidavit in support of the application he deposed that he was arrested in connection with the deceased's death because they had been drinking together at a bar on the material day and that the deceased's body was later that day found in a pool of water. It was further deposed that the Police have since arrested three other people in connection with the deceased's death and that one of these has confessed to having killed the deceased. He deposed that the Police are still holding on to him for no good reason. He further deposed that he is married and has six children and a fixed place of abode in his village where he has built his matrimonial home. He deponed that he would not abscond and prayed that he be released on bail.

6. Although the State was duly served with the application, it neither filed an affidavit in opposition nor appeared at the hearing of the application to oppose it. The application was refused on two grounds, namely that the appellant did not show exceptional circumstances and that the State was given too little time to investigate the case. This order was again made by Chipeta, J.

7. Finally, we turn to Criminal Appeal Number 27 of 2005 in which the appellant is Roy Mangame. Here again the appellant stands charged with the offence of murder. He was arrested at the end of February, 2005 by the Blantyre Police and remanded at Chichiri Prison by the Chief Resident Magistrate, Blantyre. He is accused of causing the deaths of one Mrs. Elias and one Yamikani Elias on or about the 1st day of December, 2004 at Chinseu in Ndirande Township. The deaths occurred after robbers had robbed a Mrs. Helen Hinde of a motor vehicle at gunpoint and run over the two deceased persons as the robbers were fleeing.

8. After being remanded in custody on the murder charge the applicant was then charged with the armed robbery of the motor vehicle but he was later

discharged by the said Chief Resident Magistrate for want of evidence. In his affidavit in support of the application the appellant deposed that it is very likely that should he be tried on the murder charge he would also be discharged, for want of evidence, since the alleged armed robbery and murder offences occurred as a single transaction within moments of each other, so much so that the State would necessarily have to rely on substantially the same evidence it would have relied on in the robbery case. The appellant deponed that the speed with which the State withdrew the robbery charge simply showed that the State did not have faith in its case against him. He deponed further that he runs a minibus business and has a house in Ndirande where he lives with his wife and two children. He asked the court to grant him bail for these reasons. The court below took the view that it would not be in the interest of justice, on the available facts, to release the appellant on bail, so the application was dismissed. The order was made by Mkandawire, J.

9. We will deal first with Criminal Appeals Nos. 25 and 26. As we have indicated the applications for bail in those two cases came before one and the same Judge. Five grounds of appeal were filed, but the substantial point taken is that the learned Judge erred in holding that the applicants, now appellants, had to prove exceptional circumstances before being admitted to bail on a murder charge, when section 42(2)(e) of the Constitution clearly stipulates that bail should be granted unless the interests of justice require otherwise.

10. As was pointed out by Counsel for the appellants, there are, in relation to bail applications by murder suspects, two conflicting views both in the Supreme Court and the High Court as to how the said section 42(2)(e) applies in such applications.

11. On the one hand this court held, in ***McWilliam Lunguzi v The Republic***, MSCA Criminal Appeal Number 1 of 1995, that the court's discretion to release a suspect in a murder case on bail is rarely exercised and only upon proof, by

the applicant, of exceptional circumstances.

12. On the other hand this Court held, in ***John Tembo and 2 Others v the DPP***, MSCA Criminal Appeal Number 16 of 1995, that courts have a real discretion to grant bail, even to murder suspects, unless the interests of justice will clearly be prejudiced thereby, and that the onus is on the State to prove this.

13. These two conflicting decisions, both made by the final court in the land, have tended to confuse the courts as to which one should be followed. Notably the cases of ***Amon Zgambo v Republic,*** MSCA Criminal Appeal Number 11 of 1998, ***Brave Nyirenda v Republic***, MSCA Criminal Appeal Number 15 of 2001, and the present appeals of course, followed the ***Lunguzi*** case. On the other hand the cases of ***Dickson Zulu and 4 others v Republic***, Misc. Criminal Application Number 136 of 2001 and ***Ingeresi Mimu v Republic***, Misc. Criminal Application Number 50 of 2005, followed the ***Tembo*** case.

14. The present appeals therefore avail this court an opportunity to re-examine the two cases herein, namely the ***Lunguzi*** and ***Tembo*** cases, and come up with a clear authority on the subject.

15. The first observation to be made is that there are several principles that are common ground and accepted in both the ***Lunguzi*** and ***Tembo*** cases.

16. The first principle is that the High Court has power to release on bail a person accused of any offence, including murder: see page 4, para 4 of the ***Lunguzi*** judgment and page 4, para 1 of the ***Tembo*** judgment.

17. The second principle is that the right to bail, which is stipulated in section 42(2)(e) of the Constitution, is not an absolute right; it is subject to the interests of justice. The court in the ***Lunguzi*** case expressed this principle in the following words—“In our view the right to bail which section 42(2)(e) of the Constitution now enshrines does not create an absolute right to bail. The section still reserves the discretion to the courts and it makes the position absolutely clear that courts can refuse bail if they are satisfied that the

interest of justice so requires."

18. The third principle that is common ground in both the ***Lunguzi Tembo*** cases is that the burden lies on the State to prove it would not be in the interest of justice to grant bail to a murder suspect. On this aspect the court in the ***Lunguzi*** case stated—"We would like to make quite clear that it is for the State to show cause why it would be in the interest of justice not to release the accused on bail."

19. The two cases then go separate ways where, in a sudden turn, the court in the ***Lunguzi*** case introduces the concept of "**exceptional circumstances**" It is pertinent to reproduce the relevant passage in the judgment. At page 6 the court said—"…. the discretion to grant bail in the more serious offences must be exercised with extreme caution and care. Murder, apart from treason, is the most heinous offence known to the law. The punishment for murder, under our law, is death. The law of this country has always been that it is rare, indeed unusual that a person charged with an offence of the highest magnitude like murder should be admitted to bail. From a perusal of cases from other jurisdictions it is clear that this is also the law in most common law countries. The general practice in most commonwealth countries is that the discretion to release a capital offender on bail is very unusual and is rarely exercised and, when it is done, it is only in the rarest of cases and only on proof of exceptional circumstances."

20. It is on the authority of that judgment that several judges in the High Court have refused to grant bail to murder suspects on the ground that the suspects were required, and had failed, to prove exceptional circumstances.

21. On the other hand the approach taken by the court in the ***Tembo*** judgment was that courts should grant bail even in murder cases unless the interests of justice would, in so doing, be prejudiced or frustrated. The court, per Unyolo, JA (as he then was) and Kalaile, JA, then set out some of the fundamental

principles the court would have to consider in answering the question whether or not the interests of justice require that the accused be denied or granted bail. Specific mention was made of such principles as the likelihood of the accused standing his trial, the likelihood of his interfering with witnesses or tampering with evidence, the likelihood of his re-offending while on bail, and the risk to his security if released on bail. The court also stated the general factors that would be considered in considering these principles. Further the court in that case took the view that the burden lay on the State, not the accused, to prove these issues, to the satisfaction of the court.

22. Reverting to the present appeals, counsel for the appellants submitted that the Constitution, in section 42(2)(e), limits the right to bail only by interests of justice and that the concept of exceptional circumstances propounded by this court in the ***Lunguzi*** case has no constitutional mandate. Counsel submitted that the said concept emanates from the Common Law which never provided the right to bail, but made the granting or refusal of bail purely discretionary. He argued that because of the discretionary element, there must have been the need for the applicant to give the court a basis on which the court could exercise its discretion, and that in the case of murder, the burden to be surmounted was huge, which explains why it was very rare that courts would release a murder suspect on bail.

23. Counsel for the appellants submitted further that the ***Lunguzi*** case, in looking to common law and Commonwealth decisions when propounding the bail guidelines for murder cases, omitted to state whether the countries from which the decisions emanated had constitutional provisions like section 42(2)(e) of our Constitution which specifically enshrines the right to bail.

24. Finally, counsel for the appellants argued that since the Constitution casts the burden on the State to show that interests of justice would suffer if a murder suspect was released on bail, it would be unconstitutional to require the

applicant to prove exceptional circumstances, as this would tantamount to taking away a constitutionally guaranteed right through unconstitutional means.

25. On his part, counsel for the respondent vehemently defended the requirement of proof of exceptional circumstances in applications for bail by murder suspects. Counsel submitted that the requirement of exceptional circumstances gives meaning to the notion of interests of justice, in section 42(2)(e) of the Constitution, as it pertains to bail issues. He pointed out that paramount to the interests of justice is the probability of the accused person to stand trial and that the requirement of exceptional circumstances is justified on the basis that if such exceptional circumstances do not exist, the accused person will try and avoid his trial.

26. Counsel for the respondent further submitted that to rely on section 42(2)(e) in a wholesale manner, as was argued by the appellants, was to completely ignore that the section comes with a condition, namely, the existence of interests of justice. He submitted that arguing for the removal of the requirement of exceptional circumstances tantamounts to arguing for the removal of the said condition for, without this requirement, the condition will exist without any guideline as to what that interest of justice is.

27. We have considered learned counsel’s submissions on both sides carefully. On this note we wish to commend both counsel for their lucid arguments and industry in looking up the law.

28. Just to recapitulate, we have indicated that it is common ground 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.

29. Referring to the ***Lunguzi***case we have no reason to doubt the sentiments expressed by the court in that case that the law in most common law countries and the general practice in most Commonwealth countries is that the discretion to release a person accused of a capital offence, such as murder, is unusual and rarely exercised and, when exercised, it is only in the rarest of cases and upon proof of exceptional circumstances. Having said this it is however significant, as was submitted by counsel for the appellants, that the common law did not provide the right to bail as our Constitution does.

30. As we have just seen, section 42(2)(e) clearly provides that an accused person shall have the right to be released on bail unless the interests of justice require otherwise. Counsel for the respondent argued that this provision should be read as saying that an accused person may be released on bail if he proves exceptional circumstances to the court. With respect, clear as the section is, we are unable to join with counsel in this view. As we have repeatedly pointed out it is not disputed that with reference to the issue of bail, the onus is on the State to show or prove that the interests of justice require the accused person's continued detention.

31. In terms of procedure from experience what would happen in practice is that a murder suspect would make an application before the High Court asking that he should be granted bail. In most cases the complaint will be that he has been in custody for too long. He may add that he did not commit the offence he was arrested and detained for. He may also complain about his ill-health. Then according to section 42(2)(e) it will fall upon the State to show, by giving

reasons, that the interests of justice require that bail should not be granted or, what is the same thing, by giving reasons why it would not be in the interests of justice to grant bail to the accused person. Of course after the State has proffered its reasons in this regard the court will give the accused person an opportunity to respond. But that does not mean, as counsel for the respondent submitted, that in so doing the court was in essence thereby asking the accused person to show exceptional circumstances. It is simply an opportunity availed the accused person to challenge the matters raised by the State in opposition to his being granted bail.

32. Referring to the decided cases on this subject it is not in dispute that in considering the issue of the interests of justice the paramount issues the court will consider include the likelihood of the accused person attending at his trial, the risk that if released on bail the accused person will interfere with the prosecution witnesses or tamper with evidence, the likelihood of his committing another offence or other offences and also the risk to the accused person, if granted bail and he returns to his village where the deceased's relations may harm him. In considering these issues the court may take into account, among other things, such factors as the gravity of the offence, the punishment likely to be imposed and, indeed, as was conceded by the court in the ***Lunguzi*** case, that the accused is a sickly person. See page 6 of the judgment.

33. Coincidentally, it will be seen from both the ***Lunguzi*** and ***Zgambo***cases that the issues the courts, in those two cases, said constitute exceptional circumstances and which the accused person is required to prove, are the very issues this court, in agreement with the holding in the ***Tembo*** case, is saying the State must prove in support of its objection to bail being granted. With respect, this latter approach in our view makes good sense. It is trite that he who asserts the existence of something must prove the same. If the State

asserts that it would not be in the interests of justice that the accused person be granted bail, then it follows, on the principle just stated, that the State must give reasons in support of the assertion.

34. For the foregoing reasons, we hold, in agreement with the submission made by counsel for the two appellants, that the requirement of proof of exceptional circumstances by a murder suspect applying for bail in the High Court is not the correct approach, and should no longer be followed. Perhaps we should add, for the avoidance of confusion, that the requirement for proof of exceptional circumstances is sound and correct only in relation to applications for bail after conviction, as held in the case of ***Pandirker v Republic***6 ALR Mal. 204. It is only to that limited extent the principle of exceptional circumstances is applicable. Needless to mention on this aspect that section 42(2)(e) applies only to issues of bail before conviction, not after.

35. We now turn to Criminal Appeal Number 27. As earlier indicated, the court below refused to grant the appellant bail on the ground that, in the learned judge's view, it would not be in the interests of justice to do so. The lower court commendably followed the correct approach. However, the problem is that the court in its judgment did not come out clearly as to how it came to the conclusion that it would not be in the interests of justice to grant the appellant bail. It was necessary and important for the court to state the precise issues, for example was it the likelihood of the appellant jumping bail and failing to appear for his trial, that exercised the lower court's mind. As it was, both the appellant and this court are left groping in the dark, so to say. For this reason, we are unable to support the decision of the court below on this aspect.

36. Finally, it will be seen from the remarks we have made here and there in this judgment that the real problem in these matters is that there was uncertainty to a large extent as to the correct approach and procedure to be adopted in

applications for bail in the High Court by murder suspects. We hope that the position has now been clarified by this judgment.

37. Accordingly, in all fairness to the parties on both sides and indeed in fairness to the courts below, our order in the present appeals is that the appellants should promptly bring fresh applications for bail which the courts below will then deal with guided by the new procedure we have pronounced in this judgment.

38. **DELIVERED** in Open Court this 16thday of November, 2005, at Blantyre.