# Mc William Lunguzi v Republic

Judgment

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| **Court:** | Supreme Court Of Appeal |
| **Bench:** | The Honourable, The Chief Justice Banda, JA, The Honourable Justice Villiera, JA, The Honourable Justice Chatsika, JA |
| **Cause Number:** | MSCA Criminal Appeal Number 1 of 1995 |
| **Date of Judgment:** | August 21, 1995 |
| **Bar:** | Mr. Gustave Kaliwo, Counsel for the Appellant<br>Mr. Mwenelupembe, Counsel for the Respondent |

1. This is an appeal brought by the DPP in terms of section 11 (3) of the Supreme Court of Appeal Act. It is an appeal against the ruling of the learned Judge in the High Court granting bail to the respondent. The respondent had first applied for bail at the Chief Resident Magistrate's Court sitting at Lilongwe were it was refused.
2. It would appear that the respondent is charged in three counts and has already been committed to the High Court for trial. The first charge against the respondent is one of conspiracy to obstruct the course of justice contrary to section 109 of the penal code. The first charge is a misdemeanour and therefore only punishable with a term of imprisonment

of 2 years. The second charge against the respondent is one of destroying evidence contrary to section 108 of the penal code. It is punishable with a term of imprisonment of five years. The third charge against the respondent is one of being an accessory after the fact to murder contrary to section 225 of the penal code. It is punishable with life imprisonment. The third charge is the most serious of the three charges.

3. Originally the learned DPP filed 11 grounds of appeal but on ·17th May 1995 amended grounds of appeal were filed and these were later reduced to only 3. It is on these latter grounds that Mr. Mwenelupembe, who appeared for the DPP, has argued this appeal. Mr. Mwenelupembe combined grounds 1 and 3 when arguing the appeal. It was his submission that the learned Judge in the lower court misdirected himself on both the burden and standard of proof. Mr. Mwenelupembe contended that the learned Judge imposed a higher standard of proof on the state in showing cause why bail should not be granted. He contended that the correct standard of proof which devolves upon the state in showing cause why bail should not be granted in any given case is proof on a balance of probabilities. He referred to the passage in the judgment at page 14 of the judgment where the learned Judge stated "..... I tend to think the burden is much heavier on the prosecution than the accused .....". Mr. 'Mwenelupembe referred us to Zimbabwean authorities and other authorities from our own jurisdiction which support his contention that the standard of proof cast upon the prosecution in showing cause why bail should not be granted is proof on a balance of probabilities. It was **Mr.** Mwenelupembe's further submission that once the state has discharged its burden the latter shifts to the applicant who should also show, on a balance of probabilities, that bail would not prejudice the interest of justice. He submitted that it is up to the applicant, especially in murder

cases, to show special circumstances which would justify releasing him on bail. Mr. Mwenelupembe also contended that the learned Judge should have taken judicial notice of the findings of the Mwanza Commission of Inquiry Report.

4. The essence of Mr. Mwenelupembe's submission on ground three was that the learned judge did not properly consider or relate the issue of opulence to the facts of the case. He contended that had the learned judge correctly directed himself on the burden of proof and if he had properly considered the issue of opulence of the respondent the cumulative effect of the DPP's submission, in the lower court, would have weighed heavily against granting bail to the respondent.
5. Mr. Kaliwo, who appeared for the respondent, submitted that in considering this appeal the court must not lose sight of the findings of the lower court and the constitutional and statutory provisions which govern the issue of bail. He submitted that section 42 (2) (e) of the Constitution has created a right of bail and that it is incumbent on the prosecution to show that the accused is not entitled to bail. Mr. Kaliwo also referred us to section 118 of the Criminal Procedure and Evidence Code. It was Mr. Kaliwo's contention that the learned judge did not misdirect himself on the burden of proof and he cited the case of *R-v-Tembo and Others*Misc. Criminal Application No. 1 of 1995 (unreported) where Mwaungulu J. gave a similar direction on the question of burden of proof. He reinforced his argument by referring to section 187 (1) of Criminal Procedure and Evidence Code. It was therefore Mr. Kaliwo's contention that the learned judge correctly directed himself on the burden of proof. Mr. Kaliwo has argued that it is a misconception to allege that the learned judge in the lower court failed to take judicial notice of the Mwanza Commission Report. He submitted that the Judge took judicial notice of the existence of the Report but quite properly refused to

make findings based on its contents. Mr. Kaliwo further submitted that the learned Judge adequately dealt with the issue of opulence and he therefore submitted that the grounds of appeal and the arguments which Mr. Mwenelupembe has advanced lacked merit and he prayed that the appeal should be dismissed in its entirety.

6. We have carefully considered all the arguments which both Counsel put forward with force and ability. We are satisfied that the learned judge correctly directed himself on the burden of proof which the prosecution must discharge to show cause why bail should not be granted. It is true that the learned judge did not specifically find that the standard of proof which the prosecution must discharge is one on a balance of probabilities and although there are passages which would suggest that he was thinking of the higher standard of proof we are satisfied that on reading together all the judge's passages on the burden of proof we find that what he had in mind is proof on a balance or preponderance of probabilities. We are therefore satisfied that the learned Judge correctly directed himself on the burden of proof. 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.

7. We are also satisfied that the Judge's approach to the Mwanza Commission Report was the correct one. He took judicial notice of the existence of the Report which had become a notorious fact and, in our view, correctly refused to base his findings on the contents of the Report. We are further satisfied that the learned Judge carefully considered the issue of opulence and how it can influence a court in exercising its discretion in granting or refusing bail. The Judge properly directed his mind to the fundamental principles which a court must bear in mind in applications for bail and he also considered other relevant factors. The result of our findings is that

there is no merit in any of the grounds filed and argued on behalf of the DPP. This appeal must therefore fail and it is dismissed.

8. There has recently been a spate of bail applications and we consider it appropriate that we should give some guidance on the principles which courts should always bear in mind when applications for bail are brought before them.

9. First we would like to make clear beyond any doubt that the High Court has power to release on bail a person accused of any offence. In the applications which are now coming before the courts the provisions of the Constitution are being cited as authority for the bail applications. In particular it is section 42 (2) (e) of the Constitution which is being cited as the foundation for the right to bail. There are two points which must be made about the effect of section 42 (2) (e) of the Constitution. In our view the right to bail which section 42 (2) (e) 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. The second point we would like to make is that section 42 (2) (e) does not create a new right. The right to bail has always been known to our law and all that section 42 (2) (e) does is to give it constitutional force. We would like to emphasize that section 42 (2) (e) does not give an absolute right to bail. The courts will continue to exercise their discretion depending on circumstances obtaining in each particular case.

10. While it is true that the High Court can, in its discretion, grant bail in any case, we feel the discretion should be exercised with extreme caution and care in the most serious offences. There are fundamental principles of universal application in common law jurisdictions which our courts must not lose sight of. They are principles which must always be to the

forefront of any court considering an application for bail. It must be emphasized that bail must, of course, not be withheld merely as a punishment. The requirements as to bail are intended to secure the attendance of the prisoner at his or her trial. Consequently the first question a court must raise is whether the prisoner would attend his trial if he is released on bail. And in answering that question the court must consider first the nature or gravity of the offence and secondly what would be the punishment that would be visited upon the accused on conviction. We consider these principles as the fundamental ones although there are other factors which a court will also consider.

11. In some recent judgments in the High Court there have been suggestions that in order to enable the court to properly decide the issue of bail it is imperative on the prosecution to produce evidence either on affidavit or in the form of depositions. This requirement, if it is pushed too far, can have serious repercussions on trials. The statements in some of the judgments suggest that it is necessary for the court to liave this evidence to enable it to determine how strong or weak the prosecution case is or to enable the court to find out whether there is a defence available to the accused in order to decide whether or not to release the 'prisoner on bail. In our view such a requirement would be wholly wrong and highly prejudicial because any finding that the evidence was strong or weak would in effect amount to determining the very issue which must be reserved to the trial court. Applications for bail must never assume the role of semi trials. Courts must continue to confine themselves strictly to the issue of bail which can be resolved without the need of looking at the evidence. Indeed where a trial will be with a jury the issue of sufficiency or insufficiency of the evidence, is a matter, if there is evidence, which will be left to the jury to decide. It must be remembered that in many cases

bail applications will be made very early, and in most cases, it will be soon after the arrest of an accused person when the prosecution will have not even started to take statements from witnesses. It would impose an intolerable burden on the prosecution to expect them produce evidence at that stage. It is a burden which would be difficult to discharge. The decision to find whether there is sufficient or insufficient evidence or whether there is a defence available to the accused can only be made after the evidence called has been tested through cross examination by both parties and this will not be available at bail applications except on those rare occasions when committals have been made after a preliminary inquiry. It must be remembered that summary committal is a procedure which the law allows the prosecution to follow and it should not be the basis of criticism against them if they choose to follow it. However where depositions are available and they show a possible defence to be available to the prisoner the court should take them into account when considering applications for bail but it should always be remembered that it is not a decisive factor. In the Canadian case of *R-v-MONVOISIN*(1911) 3 Man L.R. 68 although the depositions clearly showed a possible defence to the charge bail was refused. In our view the discretion to grant bail should not be exercised on affidavit evidence which has not been tested in cross examination.

12. We have already indicated earlier in this judgment that the discretion to grant bail in the more serious offences must be exercised with extreme caution and care. We must therefore consider whether there will be circumstances in which a person accused of any serious or capital offences can be released on bail.

13. Murder, apart from treason, is the most heinous offence k'nown 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 our perusal of cases from other jurisdiction 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. In our view it must be rare when the interest of justice can require that a capital offender or persons accused of serious offences should be released on bail. In our judgment it cannot be an exceptional circumstance that a person is well liked by his neighbours; that he is a prominent member of a given community; that his church leader thinks highly of him; that he is a sickly person or that he has a possible defence to the charge. While a court is entitled to consider these factors in bail applications, they do not constitute exceptional circumstances to justify releasing a capital offender or persons acccused of serious offences on bail. We would like to stress it once again that the discretion to grant bail should not be exercised on affidavit evidence.

14. PRONOUNCED in Court at Blantyre on this 21st day of August, 1995.