

Nixon Finiyasi v The State

Court:	High Court of Malawi
Registry:	Criminal Division
Bench:	Honourable Justice Zione Ntaba
Cause Number:	Bail Application number 157 of 2020
Date of Judgment:	June 15, 2023
Bar:	Mr. P. Chinguwo, Counsel for the Applicant Ms. N. Longwe, Counsel for the Respondent

Summary

The Applicant, who was facing a murder charge, sought a re-application for bail after the State failed to comply with a court order to commence his trial within 120 days. The Applicant argued that his continued detention constituted an abuse of his human rights and that his circumstances had changed due to the State's non-compliance. The State did not object to the re-application for bail. The Court, in considering the application, reminded itself of a medical report from 11 April 2022, which stated that the Applicant posed a high risk of harming his family and community due to easy access to cannabis, which triggers verbal and physical violence. The Applicant's mother offered to undertake responsibility to ensure he complied with bail conditions and abstained from cannabis use.

The Court held that the constitutional right to bail is not absolute and is subject to the interests of justice. It weighed the Applicant's right to liberty and fair trial against the

public's right to safety, as highlighted by the medical report. The Court found the continued remand of the Applicant had become unlawful, as his detention had exceeded two years without prosecution. Furthermore, fair trial principles require a person to be tried within a reasonable time, which had not been the case. The Court expressed disappointment with the State's repeated failure to prosecute. Taking into account the Applicant's mental health condition and the State's lack of objection, the Court released the Applicant on bail, subject to a number of stringent conditions to mitigate the risk he posed to the public and to ensure his well-being. The bail conditions included a cash bond, provision of sureties, and a requirement to register for and adhere to an outpatient mental health treatment plan at Zomba Mental Hospital

Legislation Construed

- Constitution of the Republic of Malawi (s 42(2)(e))
- Bail Guidelines Act
- Criminal Procedure and Evidence Code

Judgment

The Application

1.1 This Court on 31 January 2023 handed down a ruling on the bail application that was brought by the Applicant in December, 2022, where the Court ordered -

1.1.1. Mr. Nickson Finiyasi is remanded back to Zomba Central Prison to await trial;

1.1.2. Zomba Mental Hospital before releasing him back to prison to ensure that his medical treatment is properly documented, and records provided to the prison

officials. Further that they should develop a treatment plan that involves regular checks on him as he is on remand; and

1.1.3. The State was ordered to -

(a) file and serve all necessary disclosures to the Court and Defence within 30 days of the date herein; and

(b) trial for the Applicant to commence within 120 days of the date herein without fail.

1.2. The re-application of bail was made on the premise that the State had failed to comply with the Court's Order as such this was a change in his circumstances as he has not been tried for the said offence. He argued that his human rights are being abused by his continued detention. He prayed that the Court released him on bail and this his mother, Fatima Saidi and other relatives shall ensure his compliance on bail as well as cannabis consumption. The Applicant argued that his mother has taken on the responsibility to ensure that he adheres to his bail including undertaking that he shall be kept in check in terms of the concerns raised in the medical report issued on 11th April, 2022. He prayed that he, therefore, be released on bail.

1.3. The State did not file any written response to the application but asked that they respond verbally by indicating that they were not objecting to bail. They prayed that the Court proceed to grant the Applicant bail on conditions that the Court deems fit.

2.0. COURT'S DETERMINATION

2.1. The Court in dealing with this bail re-application firstly reminded itself of the details of the medical report issued on 11th April, 2022 which stated as follows -

2.1.1. Risk of harming fellow clients in the hospital will be low because he will be on medication. However, Zomba Mental Hospital is a low medium secured hospital. Risk of absconding is high

2.1.2. Risk of harming his family and community is high because of easy access to cannabis.

2.2. Further, the medical opinion was that he should be in an environment where he will not have easy access to cannabis. Cannabis use makes Nickson to be verbally and physically violent. The Court having taken a second peruse of the medical report and noting the opinion notes that the Applicant is competent to stand trial and that admitting him to bail puts his family and community at risk hence the decision to remand him back to prison on 31 January, 2023.

2.3. Malawian courts including this Court recognize that the constitutional right to bail is enshrined in section 42(2)(e) however that such right to bail is not an absolute right as it is subject to limitations of the interests of justice. Their Lordships in **Fadweck Mvaha v Republic, MSCA Criminal Appeal**. No. 25 of 2005 stated that

“just to recapitulate, we have indicated that it is common ground that the High Court has power to release on bail any 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(2e) of the Constitution is not an absolute right; it is subject to the interests of justice.”

2.4. Furthermore, the Bail Guidelines Act in Guideline 4 of Part II, stipulates that

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

(a) *the likelihood that the accused, if released on bail, will attempt to evade his or her trial; and in considering this principle the court may, where applicable, take into account the following factors -*

(i) *the nature and the seriousness of the offence for which the accused is to be tried;*

- (ii) the strength of the case against the accused and the temptation that he or she may in consequence attempt to evade his or her trial;
- (iii) 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;
- (iv) whether the accused is in custody on another charge;
- (v) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
- (vi) the assets held by the accused and where such assets are situated;
- (vii) the means and travel documents held by the accused which may enable him or her to leave the country;
- (viii) 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;
- (ix) whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial; and
- (x) any other factor which in the opinion of the court should be taken into account.

2.5. Malawian courts have decided that the above-mentioned issues are according to the law factors that must be borne in mind when considering bail. This Court is very cognizant that these issues must be weighed against the interest of justice as well. In **Seleman v Republic**, 16 MLR 793, the court ruled that the primary consideration when granting bail is whether the suspect is likely to appear for his trial. In this case, it is this issue plus the risk of re-offending which must be weighed in the interests of justice, if the Applicant can be released on bail or not.

2.6. Accordingly, this court is very much cognizant that the interests of justice are at the center of any bail application. However, such interests should be carefully examined and properly balanced with the issues raised by the State and Applicant. Furthermore, recognition should be present in judicial officers that the granting of bail is further restricted by the court's discretion upon the examination of all the factors before it. In exercising this discretion, courts have had recourse to the Bail Guidelines Act which clearly states issues to be taken into consideration, especially under Part II. In this case the issue of bail was already considered and had initially been granted but depended on the medical report which eventually highlighted him as a risk to his family and community.

2.7. At this point, this Court is again requested to reconsider bail because the State has failed to prosecute within the time given by the Court. Incidentally, this Court is still concerned with the medical report's findings and had requested the Parties to address it on the risk which was highlighted. The Applicant submitted that his mother would undertake to guarantee to the Court that he will be compliant to the bail order but as well as not take cannabis. The State on the other hand did not make any submissions except to not object to the bail. This Court should state from the onset that it was and remained uncomfortable with both the Applicant and State's response to the issues. It should be remembered that compliance to the law is an individual obligation and, in the case, herein, the Applicant is a person who is facing a very serious offence, that is, murder. Therefore, it became imperative that the issues raised as concerns by the Court be addressed before determining the bail re-application herein.

2.8. Firstly, it should be highlighted that the Applicant herein as noted from the medical report is currently not having any mental health conditions or illness but those are triggered by the consumption of cannabis as such, he has no current mental illness, however, bail should be granted in line with the risk highlighted.

Accordingly, this Court must determine whether the risk highlighted is highly likely to occur, moderately likely to occur or lowly likely to occur. Further, whether the mitigation of the mother ensuring compliance is a sufficient mitigation factor. All these factors must be determined against the fact that the Applicant has been on remand beyond the prescribed statutory limits as set by the Criminal Procedure and Evidence Code. Notably, courts are duty bound to ensure that every person including those with mental health conditions or disorders no matter how caused including those brought on by substance abuse are accorded their rights as provided by law. It should be noted that the Applicant herein is not one who should have mandatory in-patient treatment because his psychiatric treatment has been, since his release from Zomba Mental Hospital been, handled as an out-patient. Notably, this out-patient treatment if any is provided by licensed health personnel of the prison service and as noted when he is on medication, the risk is low,

2.9. A further critical issue was the public interest considerations especially as noted that the medical report stated that there is a high risk of harming his family and community is high because of easy access to cannabis. The Court herein must take heed of the finding especially since the likelihood of such happening poses a major concern because it is the duty of the Court to ensure that its rulings do not endanger the safety and welfare of the public. This Court recognizes that it also owes the public including the Applicant's family, a duty to ensure their safety. It should be stressed that in the determination herein, the Court has seriously taken its duty and understands that its orders must ensure this is addressed.

2.10. This our noting all the issues raised above is cognizant that the continued remand of the Applicant has now become unlawful as it is now over two years since his last test that is, July, 2020. This position also exacerbated by the fact that the State is not prosecuting him for the murder offence, The Court would like the State to know that it is truly disappointed in its conduct. At every chance the State continues to

disregard its orders on prosecuting people. It should be highlighted that despite them not objecting to bail, the issue remains that the person has yet to be tried for the offence for which they were arrested. Additionally, they still are not free because their release on bail has restrictions. Notably, fair trial principles require that a person be tried within a reasonable time, and it is evident that this is not going to be possible as noted since his arrest, the State has not taken any further steps and his trial seems highly unlikely.

2.11. Consequently, this Court taking into account the Applicant's mental health condition, it is imperative that a mental health plan is put in place because once released from bail, a person who has mental health conditions who is not under in-patient treatment must have necessary structures to ensure their wellbeing. Courts in Malawi understand that mental health is not prioritized and highly neglected. Further that in Zomba, there is only one mental health institution as such the plan must ensure that if a person is in the villages, then considerations of costs must also be addressed.

2.12. In conclusion, after noting all the above and considering the law, this Court in line with the interests of justice hereby releases on bail the Applicant conditions set below.

3.0. ORDER

3.1. The Court on granting bail hereby sets the following terms -

3.1.1. That he pays a cash bail bond of K 150,000.00 before his release;

3.1.2. he provides two sureties to be examined by the assistant Registrar who shall be bonded for a non-cash sum of 300,000.00 each;

3.1.3. The said sureties provide the Court with a copy of their national identification cards;

3.1.4. He reports Malindi Police Station once every month on a Monday;

3.1.5. He surrenders any travelling document to the Court;

3.1.6. He seeks the permission of Officer In-charge of the above police station to travel outside Magochi;

3.1.7. He provides a copy of his national identification card before his release;

3.1.8. He does not interfere with State witness or nor tamper with evidence;

3.1.9. He does not endanger the safety and welfare of the public;

3.1.10. He does not consume alcohol or drugs during bail; and

3.1.11. He be bound to keep the peace and not commit any crime.

3.2. Additionally, in terms of the mental health plan, the Applicant shall duly register with Zomba Mental Hospital for out-patient treatment including his mother or alternative relative. A copy of the registration be provided to the Court. The Court should also be informed of the information like the number of visits. The Applicant needs for out-patient treatment. Furthermore, the Court should be informed whether the nearest medical facility has the capacity to monitor his treatment if he is unable to attend to Zomba Mental Hospital. Furthermore, the mother, Ms. Saidi provide a plan on how she shall undertake to prevent the Applicant from doing injury to himself or to any other person as she has undertaken to do. Notably, this should be done before his release from detention.

Dated this 15th June 2023