N THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Misc. Civil Cause .No. 37 of 2011

IN THE MATTER OF

Section 42(2)(e), Section 46(2) and Suction 46(3) of the Malawi constitution

BETWEEN

FELIX PAUL.....
PLAINTIFF

AND

THE ATTORNEY GENERAL.....
DEFENDANT

Coram: Manda, J

Kara for the plaintiff

Attorney General for the Defendants (Absent)

Mrs. Chílimampunga Court Cleric/interpreter

JUDGEMENT

The plaintiff brought this matter before this court by way of expedited originating summons under Order 28 of the Rules of the Supreme Court. The application was also brought within the provisions of Sections 42(2)(e), 46(2) and 46(3) of the Malawi Constitution, which the plaintiff asked this court to consider and make the following declarations:

a) That the plaintiff is entitled to a trial within a reasonable time of being arrested and charged

b) That the plaintiff also has the right not to be detained on remand for an unreasonably long period of time pending his trial

c) That an unreasonable delay in bringing the plaintiff to trial lead to a miscarriage of justice and cannot guarantee a fair trial

d) An order that the plaintiff is entitled to have an extra remission in any sentence he may eventually receive over and above any consideration the court, may have in reducing his sentence for me time already spent in custody

e) An order that the plaintiff be compensated for the unreasonable length of detention

f) An order of costs against the defendant

g) Any further order of the court

The grounds on which the plaintiff sought the above declaratory reliefs are that he was detained without trial for an unreasonable length of time and that he still had not been tried to the date of his application.

The evidence that was provided was in the form of affidavits which were sworn by the applicant, one Salima Chombe. the applicant's former neighbour in Bangwe Township and Rose Paul Mussa, the applicant's sister.

In his affidavit the applicant stated that he was detained at Chichiri Prison for a period of about 8 years without being tried, having been arrested on 15th November 2002 and released on bail on 5th July 2010. The applicant stated that prior to his arrest he was a productive member of society having been employee by a company called Right Price and also running a maize selling business. It was his evidence that from his business he was able to support his second wife and two children as well as to buy a house within Bangwe Township. The applicant also stated, that he and his first wife were divorced in 1998 and that there is one issue of the marriage by the name of Jane.

The applicant then went on to state that when he was arrested his business became defunct after his second wife took over running the same and that since being released from prison he no longer has the capital to restart his business. It was also the applicant's evidence that because of financial hardships his second wife (henceforth the wife) had to sell the house that he bought, and used the money to assist the children but that sometime in 2005, the wife left Bangwe for Chiraczulu where she was from and that she got remarried. Apparently because of this, the applicant stated that. he has not been able to see his children.

The applicant then went on to state that his life in prison was difficult particularly because he was not convicted of any crime and that he is allegedly an innocent man. The applicant stated that the conditions in priosn were poor and that he rarely go: a proper night's sleep. That the food was poor and inadequate in that he

would sometimes only get food four times a week. The applicant also stated that he whilst in prison he was depressed most of the times and could not be optimistic and no one would tell him what was happening with his case. These factors apparently led the applicant to conclude that he was being punished before he was convicted.

The applicant then went on to state that when he was arrested, the police never told him the specifics of the offences he was supposed to have committed. Rather that they first charged with the offence of theft and that when he could not confess to this offence, the offence was changed to one of murder. Curiously though, the applicant did state that whilst in Chichiri Prison he made three bail applications in 2005, 2006 and 2008 all of which were unsuccessful because the State would object to the granting of bail. Now in this regard, it must be pointed out that for the applicant not to have been granted bail it meant that on all those three occasions the court was asked to make a ruling and that on all three occasions, the court felt that, in my view, the applicant would have absconded his bail. Indeed, for the court to consider this, I would believe that it must have looked at the weight of the evidence against the applicant. In this regard then I would think that the applicant was in a position to know the charges which he was facing at that point in time. Indeed it is further curious that the applicant did also state in his affidavit that that he was never given any materials to assist in his defence and that he never met the Legal Aid Lawyer who was assigned to him throughout the duration of his detention, which makes me wonder as to how the applicant was able to make the three bail applications. Indeed it is my considered view that if the applicant was able to make three bail applications and then proceed to have them argued before a court, he cannot turn around and state that he did not have access to a lawyer, unless of course he would want to file a further affidavit deponing that he made the bail applications in person. And if indeed he was able; to file a bail application and argue it in person, then surely he should have been in a position to file an application and argue that he should be given the relevant materials for him to prepare his defence.

Thus to say the least I must slate that I did find some of the things that the applicant was stating in his affidavit to be problematic and requiring further interrogation. Of course this was not possible since the State, did not contest this application. All they did was to try to seek a preliminary objection to the application on the basis that they were not given the required three months' notice. However, as it turned out at the hearing of this application, the State had been notified of the impending suit as such I did not think that the objection was merited.

Nevertheless in looking at the application itself and the supporting evidence, the main thrust of the application is the fact that the applicant is contending that he was unreasonably detained since he spent about 8 years in custody without being tried. Of course it must be pointed out that the Section that appears in the

application and which we were asked to consider is Section 42(2)(c) of the Constitution, which reads as follows:

> *(2) Every person arrested for, or accused of, the alleged commission of an offence shall, in additionto the rights which he or shehas as a detained person, have the right—*
>
> *(e) to be released from detention, with or without bail unless the interests of justice require otherwise;*

Now clearly from the evidence that was provided, this application was not about whether the applicant ought, to have been released on bail or not since, by the applicant's own admission that question was dealt with by the court on three occasions in which his applications for bail were denied and that on the fourth occasion the court did release him on bail. On this basis, I felt that there was no issue for me to consider here since Sections 46(2) and 46(3) of the; Malawi Constitution, deal with enforcement of rights. And in this instance 1 do not think that there was a violation of the applicant's rights as provided for under Section 42(2)(e) of the Constitution.

However what I did note is that there seems to have been an oversight on the part of counsel for the applicant in drafting the Originating Summons since the Section that is reflected in the affidavits is actually Section 42(2)(f)(i), which provides as follow:-

1. *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 portion, have the right—*

    (f) asan accused person to a fair trial, which shall include the right—

        (i) to public trial before an independent and impartial court of law withina reasonable time after having been charged;

Indeed looking at the provisions of Section 42(2)(f)(i), they are more in line with the affidavit of the applicant in certain respects. However, I do not honestly know what added value the affidavits of Salima Chombe and RosePaul Mussa, provided tothis application. Since they mostly concentrated on the applicants status before he was incarcerated and then what his wife did whilst the applicant was in prison. Now issues of the wife, running his business down, selling the applicant's property and then leaving him and taking his children with her and then remarrying, are issues which I do not think that this court ought to consider. Indeed I do not think that we can do that without the evidence of the applicant's wife since most of the decisions that she made seem to have been of a personal nature and possibly with a view that the applicant was not going to come out of prison. Indeed even the

running of the business to the ground, would in my view also involve other factors paramount of which would be the wife's abilities to run a business. In this regard, it must be stated that it was the applicant's decision to have his wife run this business, otherwise if he had doubted her capabilities then perhaps he should have found someone else to run the business for him. Further, these are also issues which, in my view, have to be looked in the context of the question as to whether there was reasonable justification for arresting the applicant in the first place. In my view, the fact that. there was delay in prosecuting the applicant does not necessarily mean that there was no evidence to support the charges against him. This fact, it may be argued, may be exemplified by the fact that the applicant had three unsuccessful bail applications.

Indeed it is my view that if the applicant wanted to raise issues concerning what happened to his family, business and property then he should have begun this action by Writ. Not only that the applicant should have also framed the issues inan appropriate manner, especially considering that these issues are raised mostly within the context of false imprisonment, which is not what is being argued in the present instance. Indeed this issue is not about the fact that the applicant has not been able to restart his business after he was released from custody.

This matter about the constitutionality of the applicant's detention whilst awaiting to he tried. Indeed what I am being asked to consider in this ease is whether there was a breach of the reasonable time requirement as stipulated in Section 42(2)(f)(i) of the Constitution of Malawi. In this regard, I believe that the test that has to be adopted would be one that was laid down in. Attorney-General's Reference (No 1 of 1990)[1992] QJ3 630, which is that (in the absence of malpractice or misbehaviour by the prosecutor) the attention of the court is directed to the single issue whether, because of the delay which has occurred, a fair trial of the accused or defendant will or may be prejudiced. This is in recognition of the fact that the overriding right when it comes to issues of delay is the right to a fairtrial. Indeed the real question which the court has to consider in all cases where delay is alleged is whether the delay has prejudiced the prospects of a fair trial. This involves the court asking itself whether the risk of prejudice from the delay is so grave that no direction by the trial judge could be expected to remove it.

Having stated what 1 have said above let me now quickly deal with points (a) and b) in the applicant's originating summons. In this regard let me point out that the Constitution is clear in Section 42(2)(f)(i), that any accused person has a right to public trial before an independent and impartial court of law within a reasonable time after having been **charged**[emphasis mine]. Similarly, in Section 42(1)(e) and (f). any person who has been detained has the right to challenge the lawfulness of his detention and to be released if such detention is unlawful. Further in Section 42(2)(e), every person who has been detained has has right to be released from such detention with or without bail. These being Constitutional

rights, which have been specifically provided for. I do not really think that I should make a declaration that the plaintiff has these rights, for it is a fact that he has these rights. Rather I would have to approach the issues from the perspective as to whether the plaintiffs rights were violated by reason of the fact that he was in custody for about 8 years? In this regard, I must agree with the observations that were made by the European Court of Human Rights in Wemhoff v Federal Republic of Germany(1968) 1 EIIRR 55. In paragraph 10 of its judgment (at p 76) the court said,

> *"The reasonableness of an accused person's continued detention must be assessed in each case according to its special features. The factors which may be taken into consideration are extremely diverse. Hence, the possibility of wide differences in opinion in the assessment of the reasonablenessof a given detention."*

Indeed in view of the above sentiments, which I do agree with entirely, I must look at the special features of the applicant's case. One of the special features of the applicant's case is of course that he was in custody for about 8 years. It is of course not clear from the evidence that the applicant provided as to whether he had been charged or not. Now if the applicant had not been charged then it was open to him to challenge the lawfulness of his detention. This would apply specifically to the period running from 25th November 2002 to 2005, when the applicant made his first bail application. Now it is not clear to me as to why the applicant did not enforce his rights in the three of so years. The applicant did not inform this court that in those first three years he did request and was denied the right to counsel, which in itself would have been a breach of his rights. Thus the fact that the applicant did not adduce any evidence that he was denied the right to counsel and thereby precluded from challenging the lawfulness of his detention would make this application problematic in the sense that it can be concluded that, the applicant personally elected not to enforce his rights. Indeed if such was the applicant's choice then I do not honestly think that he has any cause of action.

Now assuming that the applicant was indeed charged, which is the most likely scenario in this instance, and then the issue of the reasonableness of his detention has to be weighed against the case that was levelled against him. In this regard the factors that would normally be considered would be the weight of the evidence against the accused. Here is must be observed that the applicant did have three unsuccessful bail applications in 2005, '2006 and 2008. Whilst I have not been able to look at the reasons as to why the applicant was denied bail on the three occasions (since the applicant, did provide us with the Cause Numbers of his applications), I must assume that the court denied the applicant his right to bail on all the three occasions, because it felt that it was in the interest of justice to do so. Indeed I am inclined to find that the courts on the three occasions must have

reached their decisions after considering the weight of the evidence against the applicant. Now the fact that the applicant was denied ball by the court on these three occasions would clearly not. make the applicant's subsequent detentions unlawful since the same was done under an order of the court. Unless of course the applicant can demonstrate that in denying him bail, the courts on all the three occasions did not exercise their discretion judiciously. The applicant has not argued this, so again I must state that he does not have any cause of action in this regard.

Indeed I am inclined to find, in looking at the applicants case from the point that he never challenged the lawfulness of his detention and further that his further detention was under the order of the courts, him having been denied bail, that there was no breach of the reasonable detention provision. This is especially considering the fact that it may have been felt by the courts that it was in the interests of justice that the applicant should be detained in custody.

I should of course state that the fact that there was no breach of the reasonable detention provision does not necessarily mean that there was not breach of the reasonable time provision in Section 42(2)(f)(i) of the Constitution. Indeed I would agree that the State has taken too long in this instance without trying the applicant and that the period of 8 years is unreasonable. This is especially in view of the recent amendment to the Criminal Procedure and Evidence Code (Cap 8:01), of the Laws of Malawi introducing pre-trial custody time limits under Sections 162 A to J. And whilst we are on the subject, I was asked during the submissions by Mr. Kara, representing the applicant if I could set out in my judgment what I would think would be reasonable time limits for trying someone and 1 must state that in view of what has now been provided in the Criminal Procedure and Evidence Code, I do not think that I need to make any pronouncements in this regard us I feel that the time limits that have been provided in the Criminal Procedure and Evidence Code are stringent enough so as to avoid situations like the present one in future.

Further, in terms of issues of delay in bringing an accused person to trial, reference must also be made to Section 302A of the Criminal Procedure and Evidence Code which does specifically deal with time limits of trials before the High Court.

Section 302A of the Criminal Procedure and Evidence Code provides as follows:-

> *(2) Subject to subsections (2) and (3}.the trial of any person accused of an offence triable by the High Court other than any other offence punishable by imprisonment of more than three(3) years, shall—*

(a) be commenced within twelve months from the date the complaint arose; and

(b) be completed. within twelve months from the datethe trial commenced.

1. *Where the accused person is at large the period prescribed by subsection (1) within which to commence the trial shall run from the the person is arrested for the offence.*
2. *Where the cause of the failure or delay to complete the trial within the period prescribed by subsection (1) is not attributable to any conduct on the par of the prosecutions, the court shall order of time as it considers necessary to enable the completion of the trial*

(4) 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 bean 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.

It is worth noting that Sub-section (4) does state that where there in breach of the provisions of Sub-section (1), the accused shall stand discharged[1]. I do not think however that this can be concluded to mean that once there has been a delay then the accused cannot be made to stand trial, since a discharge is not an acquittal. Indeed I would agree with the observations of Lord Millet in ProcuratorFiscal, Linlithgow v. Watson & Anor (The High Court of Justiciary)[2002] 4 All ER ,2002SC (^{J}C) '89, which I shall quote as follows: -

"The right, to a hearing within a reasonable time clearly differs from the other rights in. some respects. Once there has been unreasonable delay, it is no longer possible to bring the case to trial within a reasonable time from its inception.. The most that can. be achieved is to bring it to trial without further delay. On the other hand, a right not to be tried once there has bean unreasonable delay prevents the case being heard at all in this case alone the correlative right is destructive of the primary right of fundamental importance in a society governed by the rule of law, that civil and criminal disputes should be determined by judicial process.

The European Court, has repeatedly held that unreasonable delay does not automatically render the trial or sentence liable to be set aside because of the delay (assuming that there is no other breach of the accused's Convention rights), providedthat the breachis acknowledged and the accused is provided with an adequate remedy for the delay in bringing him to trial (though not for the fact that he was brought to trial), for example, by a reduction in the sentence. '

Indeed I would agree that the most that can be achieved in this instance at this point, already being pointed out that there has been unreasonable delay in bringing the applicant to trial, is that the state should endeavour to bring the applicant's case to trial as soon as possible. In this regard. I would also agree that the fact that there is unreasonable delay does not render the trial automatically to be set aside. Indeed 1 would agree with the holding in Wemhoff v Federal Republic of Germany(1968) I 21 IRK 55 that:

"*the exceptional length of the detention was to be justified by the exceptional complexity of the case and further unavoidable reasons for delay, and the rights of the accused (it wassaid) shouldnot stand in the way of a full trial and a considered decision (p 78, para 17). The preciseaim. of the reasonable time requirement wan "to ensure that accused persons do not have to lie under a charge for too long andthat the charge is determined.*"

Of course I should also make mention of the fact that there was a dissenting opinion which was given in the Wemhoff case(supra) by Judge Zekia. alluding to the fact that that the reasonable time requirement must also be considered in the context of the right to liberty. Indeed I would agree with him that the detention of a suspect in custody for a long period of time without any proper justification would infringe on the right to liberty. However as stated earlier, in this instance part of the reasons for the applicant's continued detention in custody was that he was denied bail by the courts on three occasions and that it is the view of this court that that could only have been done on the grounds of the interests of justice. Indeed it is also possible that in denying the applicant bail the courts may also have considered issues of the charge and complexity of the case against the applicant. The applicant has of course not told us of the charge which the was facing except to state the same in general terms. The applicant has not ever argued that his case was so simple so as to leave no justification as to why the State did not prosecute it in good time. Indeed these are all factors which need to be considered when taking into account if there is a breach of the reasonable time requirement. Other factors would of course include the conduct of the accused person. Thus such factors as making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on would prevent an applicant from complaining of delay since in these instances he is considered to be the author of the delay. Now these are all issues which have not been presented or indeed argued before this court, and it is mostly because this matter was undefended.

Suffice it to say that in view of the fact that several issues were not presented before this court, including the type of charge or indeed the evidence that would be adduced against the defendant, it would be difficult for this court to make an assessment as to whether indeed me applicant will not have a fair trial. Indeed, I do not, think that I can properly make the determination as to whether the risk of prejudice from we delay is so grave that no direction by the trial judge could be

expected to remove it. In this regard therefore I must leave it to the trial judge to make a determination that the delay in bringing the applicant to trial has lead to a miscarriage of justice and that it cannot guarantee a fair trial. As stated earlier it is not expected that the rights of an accused person should stand in the way of a full trial and a considered decision by the court. Indeed it is my view that a court can only make a considered decision after it has had the opportunity to hear the evidence in a particular case. In this regard, it must be noted that the burden of proof in a criminal matter is on the State to prove that the accused person in guilty beyond all reasonable doubt and not for the accused to prove his innocence, in any case an accused person has the right to be proven guilty unless the contrary is proved. So while the applicant may argue that his possible defence witnesses may not be available for him should the matter go for trial due to the delay, however this is an argument which can only be made after the applicant has been found with a case to answer, which finding can only be made by the trial judge. This I believe deals with point(c) in the applicant's originating summons.

Finally, let me now deal with points (d) and (e) because I believe that they are related. In this regard, let begin by making the observation that sentencing is discretionary to the trial judge or magistrate. In this regard, I cannot dictate how a trial court should impose its sentence in the event that the applicant is convicted of the offences against him. This is more so considering thatthe applicant in this matter may be tried before a judge of the High Court, on whom this decision is merely persuasive. Indeed this is perhaps the reason why both High Court decisions in Mlembe v Rep1971-72 ALR Mal. 95 and Mulera v Rep1971- 72 ALR Mal. 73 do state that the date from which the sentence runs **may**[emphasis mine] be backdated to take into account the period in custody whilst awaiting trial. Of course I should point out that both of these cases dealt with appellants who had been in custody prior to sentencing, This is not the case in the present instance. The applicant in this case is yet to be tried, convicted or indeed be sentenced. In this regard, I was of the slight view that this was indeed a breach of the reasonable time requirement as provided in Section 42(2(f)(i) of the Constitution, I can only recommend to the trial court that should it convict the applicant, then it would have to consider the time that he spent in custody whenpassing its sentence. This recommendation is made in recognisance of the fact that sentencing is a matter of discretion by the trial court. In view of the fact that the trial court may take into account the time that the applicant spent in custody, I do not think that it would be appropriate for me to award damages for the breach of his right, to be tried within a reasonable time. I thus decline to make such an order for damages.

Having said all this I do not think that I will need to make any further order in this matter apart from dealing with the issue of costs. Indeed the state not having defended this matter all along and also considering the fact that it is the applicant who decided to move this court to make declarations which would by the end of the day be beneficial to him, I do not think that I should award the applicant any costs. I thus direct that the applicant should cover his own costs.

Made in Chambers this 25th day of October 2011

1Of course it must be pointed out that there will be issues as to whether the amendments to the Criminal Procedure and Evidence Code can be retrospectively applied to the applicant's case seeing as they were made well after the applicant was arrested. Nevertheless I would think that the principles that were captured do fall within the right of the accused person to be tried within a reasonable time and the right to a speedy trial.