



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

HOMICIDE CASE NUMBER 289 OF 2025

REPUBLIC

VS

RICHARD CHIMWENDO BANDA

ALFRED DALA KADULA

CORAM: HONOURABLE JUSTICE, MZONDE MVULA, PRESIDING

Kadzipatike/Mchizi/Gadama, Of Counsel for the arrested persons;

Malunda/Jafali, Counsels for the Republic;

Khonje, Court Clerk and Official Interpreter.

ORDER

Mvula, J.

1.0. Introduction

- 1.1 Section 20 of the Republic of Malawi provides for the Principle of equality. All persons must be treated with equality and remain equal before the law. In this regard, legal principles, as well as court processes must apply the same way to all legal and natural persons, guaranteeing equal and effective protection against discrimination regardless of any status. The State at law is a person, which being a powerful person, leads in upholding of

constitutional principles. In simpler terms, the Republic should treat everyone the same way it would like to be treated as a legal person.

- 1.2 There is an allegation of attempted murder on the two natural persons above, on one hand. The legal person in Republic on the one hand, is duty bound to succinctly enforce law and order. Efficient working of the Malawi Criminal Procedure is measured by the extent to which the system assists the enforcement of penal law, by speedily bringing offenders to justice. In this, imbedded is the notion that innocent individuals must be left undisturbed. The primary aim of protecting society against law breakers, once this happens, an arrest is made, facts tried, in which process, other important values such as human dignity and rule of law come in balance.
- 1.3 An arrest rolls into motion, the attendant criminal justice legal framework. In such matters, there is a blue print which must followed. Although Criminal Procedure and Evidence Code, the Code, is detailed, binding precedents or *stare decisis* detail how principles of the Code should be applied. The underlying principle under Section 3 of the Code, that substantial justice should be done without undue regard to technicality is adhered to at all times. Only legally relevant facts and prescriptions of law under section 9 of the Constitution of the Republic of Malawi, *alias* the Constitution, take precedent here.
- 1.4 This ruling coming albeit on the heels withdrawal of a bail application, is necessary. This is because the High Court is court of record. The court still sits and constitute itself, to formally record the withdrawal. See **Dr Thomsom Frank Mpinganjira v Republic MSCA No 4 of 2024(unreported)**. Each matter brought before court, is equally important, buttressing equality before the law. After all, every person has a right to an effective under Section 41(3) of the Constitution. While some matters are “routine” and can be speedily dispensed with, others raise mind boggling legal issues which need time to handle. Matters

surrounding this issue we take judicial notice on. We shall use to settle record, because Republic is one that initiated the matter, substantively.

- 1.5 The present application, despite appearing as “withdrawn” as will be seen in the discussion, raised deep seated issues that needed a sober reflection upon. As such, there is nothing like “a simple bail application” as others touted this to be. We should not create an impression that other persons are given red carpet treatment before courts, while others await the same court to pronounce itself upon, to justify what cases should last shorter.
- 1.6 In the same regard, a matter dismissed *pronto* for want of jurisdiction after a legal sojourn in an act of legal naitivity, that cannot be compared with one where issues are intricate and needed sober reflection upon, before condensing them into “a ruling”. It is often said justice delayed is justice denied. This court dares say that justice hurried, is justice denied. “Hurry-hurry is not speedy”, so an adage goes. Legal issues should be brought to the boil and be left to simmer, afterwards. This takes time especially when they are commenced just before blanket holidays in public service to before a Judge who is human with social obligations to the establishment.
- 1.7 The first applicant, who is elected member to the National Assembly and serving as Member of Parliament for Dowa East Constituency, was arrested 12th December 2025. The allegation is that on or about February 2021, the applicant together with the second applicant, attempted to murder Frank Chawanda. At Police, he denied the allegations. He swore a statement to challenge the arrest on 15th December 2025, by which time, he still was not served with disclosures linking him to commission of the alleged offences. He was placed in a Police cell until civil justice intervened sooner resulting in release from detention. He is Malawian Citizen from Katengeza village, Traditional Authority Chiwere in Dowa District.
- 1.8 On 16th December 2025, he filed in the High Court, an application to be released from detention with conditions. Before a ruling was delivered on

the facts, through counsel, he leap frogged the High Court (Criminal Division), and went to the Supreme Court to stay the warrant of arrest that was issued by the Chief Resident Magistrate. The Apex court was not a happy hunting ground for him, where he was sent back sooner than he went knocking.

- 1.9 By notice dated 13th January 2026, this Court announced that ruling to the application would be delivered today, from 10am. As this Court delved further into tripod issues we find intricate to determine the application, applicant through Counsel snaked to the High Court (Civil Division), to obtain “civil remedies” against criminal action. Unlike **Judicial Review No 1 of 2026 The State (On the application of Hon Richard Chimwendo Banda) and The Director of Public Prosecutions and the Malawi Police Service**, this court takes judicial notice proceedings thereat, as well as, the order from that court. We do not want to perpetuate any appearance that the Judiciary is in turmoil. No, it is not . It is as solid as ever!
- 1.10 Action can sustain on same facts in criminal and civil proceedings before courts of concurrent jurisdiction. However, it is the criminal action that takes priority, persuaded by decision in **R v Panel on Takeovers and Mergers ex parte Fayed [1992] BCC 524**. This court by *stare decisis* is bound however by **Republic v Director of Public Prosecutions ex parte Chilumpha [2006] MLR 101** that criminal action takes primacy over civil action. Consequently, orders in criminal actions have similar effect over civil remedies delivered in civil actions.
- 1.11 Ensuing from the order in the High Court (Civil Division), applicant purportedly withdrew his bail application before this court, which was made *inter partes*. Before the withdrawal, this court gave directions during the hearing of the application for bail. These still bind the state to come up with responses which have a huge bearing on personal liberties of any arrested person, case management notwithstanding committal

proceedings, and disclosures on the applicant, bringing and sanity to arrests, despite “withdrawal”. This is because the warrant is still hovering.

1.12 With the withdrawal of the bail pending trial application, we shall not go to discuss merits of the response by the Republic to the application. Suffice to add that the Republic disclosed to have applicants committed to the High Court week beginning 5th January 2026, with a second charge of abduction contrary to section 259 of the Penal Code, added on. This direction by the Republic still stands despite withdrawal of the application. What is more, the Republic undertook to comply with relevant provisions dealing with trial procedure in the High Court. This is what we set out to regulate this morning, through this order.

1.13 This court by way of case management, will not determine the withdrawn application, *via* examination of whether the constitutional rights of the applicant have been violated. We simply have to look at whether the conduct by the Republic on one hand, and indeed the disposition of the applicant on the other hand, warrant judicial intervention by judicial notice and activism. This is because an arrest by the Republic on the applicant is what set out in motion, the chain of events. We also uncover, if by the same token, there will be no criminal proceedings pending against the applicant, notwithstanding the withdrawal of his bail application.

2.0 **Issues for determination**

2.1 Can a person who faces actual or potential warrant of arrest withdraw an application for bail made earlier on?

2.2 What are consequences of withdrawal of bail application, if at all.

3.0 **Legal framework**

3.1 To the credulous mind, this is simply a pronouncement on the withdrawal of the bail application, graduating from what would have been a ruling on the bail application. However, to the astute legal mind, and in particular a court versed with case management, jurisprudence arising from

consequences of the withdrawal of the bail application, should exercise our (legal) minds. This is more so, given the level of interest this particular matter has generated in society, which stands to benefit from this legal precedent. After all section 12(1)(i) of the Constitution provides:

“All legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constituting solely to serve and protect their interests.”

[Emphasis supplied]

- 3.2 This confirms that how public officers conduct themselves in discharge of either legal or political authority, should earn the trust that must be continual for the people for whom it is exercised. The duty bearer should ensure that the same is done solely to serve and protect the interests of the people being served. To this end, the mummings of arresting people and not seeing cases concluded logically, only to see the victims of such abuse of state power compensated handsomely, which would have otherwise gone to more deserving social needs in the Republic, is what motivates this court trail blaze on this legal sojourn. The reasonable Malawian should be made to understand both the “whats” and the “whys” of such actions before us. Again, this sustains trust in this fiduciary duty this court holds.
- 3.3 Law is a tool to achieve justice. Being in a position of trust, the court and indeed all fiduciaries must act with utmost good faith displaying integrity, transparency, accountability, and responsiveness. These remain core values of the Malawi Judiciary. The court is a public institution which operates on tax payer money. How cases are on boarded and off boarded, should particularly interest Malawians and indeed court users it serves. Even if someone did not question, these core values on themselves should demand Courts to remain accountable to the constituents. That is what the entire section 12 of the Constitution postulates.
- 3.4 Human rights and freedoms enshrined in the Constitution of Malawi must be respected by all organs of Government established under Section 7, Section 8 and Section 9 of the Constitution. Personal liberty under section

18 of the Constitution, must be observed. The dignity of every person guaranteed by Section 19 of the Constitution, should remain inviolable as well. Driven to uphold equality of persons before law under section 20 of the Constitution, where a natural person violates the Penal Code of Malawi, let alone rights of another over enjoyment of these rights, limitation of rights by warrant of arrest takes charge inviting the following:

4.0. **Constitution of Malawi – Section 42(2)(b)**

4.1 This section guarantees that every person accused of an offence, in addition to the rights he has as a detained person, shall be released should he or she be either not told reasons of arrest, let alone, be charged. It reads;

“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 person, have the right as soon as it is reasonably possible, but not later than 48 hours after arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day, the first court day after such expiry, to be brought before an independent and impartial court of law and **to be charged or to be informed of the reason for his further detention, failing which he or she shall be released.**”

[Emphasis supplied]

4.2 Upon arrest or re-arrest, the Republic ought to seek leave of the Court to remand further an accused person, beyond 48 hours. In this regard, every arrested person must before the expiry of 48 hours, be brought to the court for three things which can happen at same time or separately. The first, to be told of the offence with which he was arrested. The second, to be remanded further up to allowable pre-trial custody time limits sanctioned by law. The third, to be formally charged of the offence with which he has been arrested. It is at that same time that the Republic may apply for period of further remand of the arrested person. This is fondly called the 48-hour rule in practice. Always, an arrested enjoys presumption of innocence under Section 42(2)(f)(iii) of the Constitution.

4.3 The 48-hour rule allows the arrested person to have opportunity to apply for release from detention. This follows *a fortiori* that an arrested person may only apply for release from detention, upon expiry of 48 hours. When arrest is made, it may not always be that the Republic is ready to prosecute the arrested. On the other hand, it may not be in the interests of justice that the arrested should be released. That is where arrest is made and application made to remand further, under section 42(2)(b) of the Constitution, up to allowable time under section 161 of the Code.

4.4 In that vein, the arrested person is only brought before court to be told reason of arrest and/or further detention. If this is not done, the arrested must be released, upon application, with or without bail. As the gymnastics of this is being wrestled, a litigant cannot go to a court of concurrent jurisdiction to obtain alternative remedies while the Republic has not withdrawn let alone concluded the main action. This act is abuse of process. See House of Lords decision in **Hunter v Chief Constable of the West Midlands Police [1982] AC 529**.

5.0 **Constitution of Malawi – Section 42(1)(f)**

5.1 This section guarantees person who is detained to have the right to be released from unlawful detention. It reads:

“Every person who is **detained**, including every sentenced prisoner shall have the right to be released if such detention is unlawful.”

[Emphasis supplied]

5.2 The section is applicable for those persons who have not been charged, or have appropriate proceedings made against them but remain incarcerated. They have a right to be released from such unlawful detention.

5.3. **Constitution of Malawi – Section 42(2)(e)**

5.4. Upon arrest, a person must be charged immediately upon expiry of 48 hours. Upon charge or application for further remand by the Republic, he can apply for release from detention, with or without bail. That application

is properly grounded under section 42(2)(e) of the Constitution. Counsels should never make such applications blindly, despite the withdrawal. No two cases are the same. It is important that counsel worthy of salt, should pay particular attention to that distinction. Application for release, can be made on three strands; Section 42(1)(f), Section 42(2)(e) and Section 44(1)(i) of the Constitution. They end up with similar, but not same consequences.

5.5 Section 42(1)(f) and Section 42(2)(e) of the Constitution, go together, but attain separate results. While the former applies when an arrested person has merely been detained without charge, to be released, the latter applies where the arrested person has been charged to be released from detention, with or without bail. Bail refers to conditions attached for a release.

5.6 Therefore Section 42(1)(f) of the Constitution results in release without conditions, from unlawful detention. This section accords a wider scope of restoration of liberty. On the other hand, Section 42(2)(e) of the Constitution is double pronged restoration, which accords release, either with conditions, termed bail, or without any conditions attached. In which regard, it operates as an extension of section 42(1)(f) of the Constitution.

5.7. **Constitution of Malawi- Section 44(1)(i)**

5.7.1 The Constitution provides that there shall be no derogation, restrictions or limitation with regard to the right of *habeas corpus*. As above stated, upon arrest of a person, he must be charged within 48 hours as mandated under section 42(2)(b) of the Constitution. Anything after that, the application only has two legal remedies. The first, the right to be released under section 42(1)(f) of the constitution for detention without charge, or filing an application under section 44(1)(i) of the Constitution to enjoy the right to *habeas corpus*.

5.7.2 This in simpler terms is an action which a person held in detention that does not follow the law, may exercise to compel the Republic to bring him to appear before the Judge for a determination if such detention is lawful.

This is a forceful means that guards against arbitrary detention. To this end, counsels should be ambitious and candidly enforce exercise of enjoyment of these rights for detained persons they represent. Those that may allege torture at hands of the Police, or faced mob justice and require urgent medical attention, benefit most on this limb. This allows the Judge to look at them physically, and determine their application in context. See **Republic v Nankwenya Miscellaneous Criminal Application 62 of 2003 (Principal Registry- Unreported)**.

5.8. **Criminal Procedure and Evidence Code – Section 83.**

5.8.1 The presence of an accused person before a court for trial under section 83(1) of the Code, may be effected using any of the following ways:

- (a) issuance and service of summons;
- (b) issuance a warrant of arrest;
- (c) arresting without a warrant.

5.8.2 The present matter, was initiated by the Republic through warrant of arrest. This conforms that the Republic wish to limit the liberties of the person arrested, who enjoys presumption of innocence under Section 42(2)(f)(iii) of the Constitution. The other side to that is that such person, may after arrest, be set free using two internationally accepted yardsticks.

- (a) Police bail which is granted under section 35(3) of the Code;
- (b) Magistrate Court bail under section 97 of the Code; and/or
- (c) High Court bail under Section 118 of the Code.

5.8.3 The Code enlists provisions that establish maximum pre-trial custody periods. Section 161B requires a person to be in lawful custody, which can only be with the sanction of Court order pending trial. Under section 161C of the Code, time shall run after expiry of forty-eight hours **after** arrest. The maximum period for lawful custody of an offence in the High Court, pending committal is thirty days, per Section 161E of the Code.

5.8.4 Taking judicial notice of the civil action the applicant instituted in the Civil Division of the High Court, which is of concurrent jurisdiction to this High

Court, cognizant of the fact that it is criminal justice under trial, it goes without mention that action ought to be had in the Criminal Division. See **Republic v Director of Public Prosecutions ex parte Chilumpha (Supra)**. After all, these Divisions were established to bring sanity to court proceedings and avoid what the Supreme Court termed “judicial tourism.” A matter of its own determines which Division of the High Court, an action can be sustained. It is like a pair of shoes. It was predestined that the left foot goes in the left shoe, while the right foot goes into the right shoe.

5.8.5 The law allows the Republic to hold onto the persons accused for serious offences with leave of the court, up to 90 days before trial under section 161 G. This means the period for remand is with leave of the Court after committal but before trial. This matter is before committal, governed by Part VIII of the Code. Section 161E of the Code is relevant, because the murder charge is triable in the High Court, maximum period of remand being 30 days before committal proceedings are held.

5.8.6 In other words, the court cannot remand a person beyond the prescribed time lines, criminal procedural statute has enlisted for operation and use in the Malawian jurisdiction. Section 161G of the Code reads;

(g) “In the case of offences including murder, treason, genocide, rape, defilement, and robbery, the maximum lawful custody period pending commencement of trial shall be ninety (90) days.”

5.8.7 The right to bail under section 42(2)(e) of the Constitution is supreme and takes primacy with section 5 of the Constitution, over pre-trial time limits. While right to bail is paramount because it comes from the constitution, dictates of sections 161(G) and 161(H) of the Code are subservient to the Constitution. They merely govern procedure. While Section 42 rights under the constitution are primary and fundamental, the pre-trial time limits under the Code, fall secondary to the fundamental rights. Accordingly, person detained, let alone charged, may still enforce enjoyment of rights under section 42(1)(f), Section 42(2)(e) and Section 44(1)(i) of the Constitution as the case may be, seeking release from

detention with or without for bail, despite procedural safeguard in sections 161F and G of the Code, respectively.

5.8.8 The above notwithstanding, the applicant secured release using civil remedy before the Civil court in judicial review proceedings. If the issue is “delay” in the criminal justice avenue, the remedy before the same criminal court, or abridging the time lines allowable by statute in criminal justice. All available remedies must first be exhausted there, before escalation. See **State v President of the Republic of Malawi and Others ex parte Malawi Law Society [2007] MWSC 7**. Instituting alternate/parallel proceedings in another Court of concurrent jurisdiction is abuse of process. So doing opens the judiciary and its establishment to unwarranted attacks which go to the integrity of the whole justice system. See **Hunter v Chief Constable of the West Midlands Police (supra)**.

5.8.9 After all, judicial review proceedings cannot stand where a person seeking aid of the law, has an alternative remedy. See **In re Criminal case 42 of 2013 and related matters ex parte Peoples’ Trading Center Limited: S v Attorney General (The First Grade Magistrate Anthony C. Banda) 2013 MLR 96**. The court in the matter cited declined to grant leave to apply for Judicial Review on the ground that the applicant had available to him an alternative remedy under Courts Act. The Criminal Procedure and Evidence Code was open to allow PTC Ltd to resort to and obtain reliefs that it sought for which applied under Judicial Review. However, civil action may lie for wrongful arrest should the facts be tried and proven otherwise. See **Stanley Phiri and 2 Others v Attorney General (Malawi Police Service) Civil Case 489 of 2016 (Principal Registry-Unreported)**.

6.0 **Concluding thoughts**

6.1 Applicant has suspended operation of the warrant that had him arrested. That warrant is ambulatory. At the moment, it is hovering over the until the time events will dictate otherwise. Having withdrawn the application

for bail, the applicant remains without safeguard should the warrant crystalize and attach as expected. This remains, especially during committal proceedings, potentially pulling trigger for Section 161G of the Code into motion, where an arrested may remain up to 90 days remanded.

- 6.2 It would be procedurally improper to allow such an arrested return to custody, when he tried so hard to secure freedom, simply because the Republic did not exercise the two limbs of section 42(2)(b) of the Constitution. The first to charge the offender. The Second to be informed reason of further detention. Most importantly, the former.
- 6.3 The record so far is clear. The Republic, informed the applicant reasons why he was detained. The said Section 42(2)(b) was complied with. The applicant applied for bail, at which hearing of 24th December 2025, this Court gave directions it expects compliance, regardless of withdrawal or not. These are operational because they touch on case management, and procedure this courts is mandated to uphold. The Republic placed on record that compliance would commence from 5th January 2026.
- 6.4 Temporary relief in a civil court for a criminal matter, was technically an unconditional release (a release on bail without conditions). After that, applicant filed a notice of withdrawal of bail application. In other words, he takes away application to be released on conditions under section 42(2)(e) of the Constitution, citing violation of Section 42(2)(b). It suffices to state that release from unlawful detention under section 42(1)(f) as well as release under Section 42(2)(e) of the Constitution, (the part without conditions) are still open to the applicant.
- 6.5 Given the set of circumstances, a *habeas corpus* application under Section 44(1)(i) of the Constitution, was the most appropriate application to make to secure release of the applicant. The chosen mode of bail pending trial counsel for the applicant made to court has led to confusion and butterflying in the courts to seek remedy because the application was not well thought out. Where an applicant has neither been charged, nor committed to the High Court for trial, *habeas corpus* is the most

appropriate application to make to secure release of an arrested. See **Republic v Nakhwenya (Supra)**.

- 6.6 The Republic has deponed an affidavit, with a copy filed in this court, that it is ready to commit the applicant to trial. There is change of fundamental circumstances. Subject of the proceedings is no longer visited by God which saw him admitted to hospital the time at the material time committal proceedings should have been had. Certificate of summary procedure for the applicants has been filed. One limb of the direction by court, is complied with. The second limb of disclosures remains.
- 6.7 To avoid a situation where applicant ends up going back into custody for 90 days under section 161G of the Code, because of withdrawal of bail condition whose ramifications he did not see farther, the Court shall exercise judicial discretion, judicially. Given the ambulatory nature of the warrant of arrest, this court shall exercise judicial activism to avoid embarrassment on the arrested. This is the only way to ensure that substantial justice is done without undue regard to technicality under section 3 of the Code. After all, where there are criminal proceedings and civil proceedings on the same facts, the criminal Proceedings take priority. See **Republic v Director of Public Prosecutions ex parte Chilumpha (Supra)**. This means that civil proceedings and criminal proceedings on the same set of facts cannot run side by side, because one runs supreme.
- 6.8 Criminal Proceedings are instituted by the Republic through the Director of Public Prosecutions under section 76(1) of the Code. They end, either by entry of discontinuance under section 77(1) of the Code, or court judgment under section 139 and 140 of the Code. Withdrawal of an application by the applicant, does not end proceedings. What is more it does not invalidate directions issued by the court during any part of a hearing. As aforesaid, the directions remain ambulatory until either section 77(1) or section 139 and 140 of the Code as the case may be, take charge.
- 6.9 In this regard, while the court has taken judicial notice of withdrawal, the same should be informed to the party, especially if it will have adverse

effects on the party making it. Substantial justice should be done without undue regard to technicality. Technicality will cause knee jerk reaction to the party moving, and boomerang to haunt. This court has discretion to grant reliefs akin to bail in *meri motu*, subject to the interests of justice. While applicant is out on technicality, substantively, the High Court (Criminal Division) has primary jurisdiction to enforce criminal justice.

6.10 Against these backgrounds, to enforce Section 3 of the Code, this court makes the following usual orders, it particularly makes in all matters before it, for effective case management to court proceedings. It orders the Republic to;

(a) release arrested without conditions under section 42(1)(f) of the Constitution;

(b) *ceteris paribus* avail themselves to committal proceedings before the Court which issued the warrant of arrest, within 14 days of this order;

(c) upon expiry of (b), serve disclosures on the arrested persons the warrants to these proceedings are directed at, within 60 days of this order;

(d) proceed for plea and directions on 31st March 2026.

6.11 Justice is served today, where the Criminal justice machinery which has primary jurisdiction in criminal justice in Malawi, has made the appropriate orders it was scheduled to make, owing to nature of arrested.

6.12 In further upholding personal liberties of the arrested persons herein, the Republic may commence subsequent criminal actions against any them. However, summons to Police at 24 hours' notice to conduct interrogation let alone investigations, should not be violated should Republic so desire.

Per curium

Made in Court this 20th January 2025 in Lilongwe



JUDGE.