

ADMIRE MKANDLA

AND

KEITH NYATHI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 16 & 22 FEBRUARY & 17 AUGUST 2023

Application for bail pending trial

TAKUVA J: The two applicants seek bail pending trial. They face numerous counts of attempted murder, robbery, assault, theft and malicious damage to property. In respect of some counts they are jointly charged while in others they appear individually.

According to the Investigating Officer Constable Georgina Ndlovu the charges she is investing are as follows;

<u>Station</u>	<u>CR</u>	<u>Charge</u>
Nkulumane	B2/07/23	Attempted Murder

Keith Nyathi assaulted Gilbert Ndlovu once on the head with a stone and thrice on the head with an iron bar. First applicant then stabbed complainant with a knife on the head thrice.

<u>Station</u>	<u>CR</u>	<u>Charge</u>
Nkulumane	B3/01/23	Malicious damage to property, Attempted murder

Both are alleged to have attacked complainant one Wellington Muchingami with an iron bar and a stone on the head. They also maliciously damaged the complainant's car by stoning it on the front and rear windscreens.

<u>Station</u>	<u>CR</u>	<u>Charge</u>
Nklumane	B 38/11/21	Two counts of robbery

The second applicant assaulted Beven Nkatazo and Shalon Bhebhe. He robbed them of cash in the sum of US\$55,00 and cell phone.

<u>Station</u>	<u>CR</u>	<u>Charge</u>
Nkulumane	27/02/21 07/1/23	Two counts of assault

First applicant assaulted S. Moyo and R. Dube

Nkulumane	138/02/21	Attempted murder
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First applicant severely assaulted Fidelis Mpofu with a brick and clenched fists on the head.

During the hearing applicants through their lawyer argued that the Investigating Officer simply plucked crime register numbers from the air to ensure that applicants are denied bail. It was also argued that the 1st applicant is resident at house number 3975 Nkulumane and he was never on the run.

In order to rebut these allegations the State called the Investigating Officer one Georgina Ndlovu. “who denied, that the CRS were fictitious. She explained that there are CRS where witness can no longer be located from the time they filed their reports and that some CRS involve cases where applicants are jointly charged with accomplices who are still at large. It was her evidence that the two applicants were on the run until they were arrested after police received a tip off on 25 January 2023. It took long to arrest the applicants as according to the Investigating Officer they have no fixed abode. She was told by 1st applicant that he was resident at house number 3975 Nkulumane but when she visited the house she was informed that the 1st applicant was not known at that address.

The cases against the applicants have witnesses available. She opposed the granting of bail on the following grounds.

1. The accused person have a propensity to commit similar offences using the same *modus operandi*.
2. The accused persons are facing serious allegations and if convicted they are likely to be given a custodial sentence hence are likely to abscond court.
3. The accused persons were arrested after being on the run for a period between year 2021 to January 2023. Efforts to locate them were being made through applying for warrants of apprehension and raids at public places where they

frequently drank beer to no avail. The police had no physical addresses for the two accused persons hence no one was visited to try and enquire of their whereabouts. The accused persons were eventually arrested in Nkulumane through a tip off from members of the community at a local beer spot.

In her heads of argument, Ms N. Ngwenya for the respondent argued that there are compelling reasons warranting the continued incarceration of the applicants in that;

- (a) Applicants were on the run from the year 2021 up until January 2023;
- (b) The CRS indicate that applicants were involved in a spate of similar offences involving the use of violence within the same locality of Nkulumane;
- (c) Applicants have a propensity to commit similar offences;
- (d) The State has a strong *prima facie* case against the applicants;
- (e) Applicants are likely to abscond; and
- (f) The release of the applicants on bail will jeopardise the interests of justice.

The law

The right of an accused person to be released on bail pending trial is enshrined in section 50 (1) (d) of the Constitution of Zimbabwe which provides;

“Rights of arrested and detained persons

- (i) Any person who is arrested –
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention”.

See also *Munsaka v The State* HB-55-16; *Agrippa Mloyi v The State* HB-123-20

Statutory provisions governing the granting of bail pending trial are found in Part IX of the Criminal Procedure and Evidence Act [Chapter 9:07] in section 115 to 117 thereof. Paraphrased section 117 (2) (a) (ii) states that it will be in the interests of justice to deny an applicant bail if there is a likelihood that if released on bail he will not appear to stand trial or

appear to receive sentence. Further, section 117 (3) (b) provides that in determining whether or not there is a likelihood to abscond on the part of the applicant, the court may take into account the nature and gravity of the offence charged, the likely penalty upon conviction and the strength of the prosecution case.

When assessing the risk of an applicant absconding before trial, the court will be guided by the above factors. See *S v Jongwe* 20222 (2) ZLR 209 (S); *S v Chiadzwa* 1988 (2) ZLR 19 (S); *Aitken & Anor v A-G* 1992 (7) ZLR 249 (S).

In casu, I find the Investigating Officer to be a credible witness in that all the many CRS were extracted from the Crime Register kept at station. I believe her when she said both applicants were on the run for how else can one commit numerous offences within Nkulumane and still remain free. Applicants were hiding from the police. The applicants are facing three (3) counts of attempted murder, two (2) counts of robbery, one (1) count of malicious damage to property and two (2) counts of assault. These are very grave charges of which upon conviction, applicants are likely to be sentenced to lengthy terms of imprisonment. The temptation to abscond if granted bail is real.

Further, the applicants' propensity to commit similar offences is shown by the multiplicity of cases involving violence and dishonesty. In that respect I agree with Ms Ngwenya that if released on bail applicants will continue terrorizing the Nkulumane community thereby jeopardise the interests of justice and belief in the justice system by this community. Clearly, the applicants had become a menace to the Nkulumane community.

In my view and for the above reasons, there are compelling reasons warranting the continued incarceration of the applicants. The application is without merit.

In the result, I order as follows;

The application for bail be and is hereby dismissed.