

KEITH MZINGAYE DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 20 MARCH 2023 & 23 MARCH 2023

Bail Application

P. Butshe, for the applicant

K. Guveya, for the respondent

MAKONESE J: The applicant is a 17 year old juvenile attending Form 3 at Hamilton High School, Bulawayo. He is facing a murder charge as defined in section 47 (1) (c) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). Applicant denies the allegations of murder. The state is opposed to the granting of bail pending trial on the grounds that applicant is facing an offence specified under Part 1 of the Third Schedule to the Criminal Procedure and Evidence Act (Chapter 9:07), and therefore must discharge the onus on him to show that he is a good candidate for bail. Further, the state contends that applicant has failed to demonstrate the existence of exceptional circumstances which, in the interests of justice to warrant his release on bail.

FACTUAL BACKGROUND

On 13th February 2023 and at around 1600 hours the applicant knocked off from school and was walking with a friend towards Plumtree Road, Bulawayo. As applicant approached the intersection of Eversham Road and Plumtree Road, he was confronted by a group of Founders High School students. The deceased was amongst the group of Founders High School boys. A scuffle ensued between the applicant and his friend on the one hand and the deceased and his colleagues. A fist fight broke out. During the scuffle, applicant pulled out an okapi knife and stabbed the deceased on the lower side of the neck. The deceased died as a result of injuries sustained in the attack. It is not in dispute that the Hamilton High School students and those from Founders High School appeared to have had some previous conflicts prior to the fateful day.

SUBMISSIONS BY THE APPLICANT

Applicant denies the charge of murder and submits that he stabbed the deceased in self-defence. Applicant states that prior to the stabbing he had not had any confrontation with any Founders High School students. Applicant states that he has some form of disability emanating from an operation that he underwent in 2012 hence he could hardly run away and escape from his attackers. Applicant submits that he is a suitable candidate for bail. He is of fixed abode. He resides with his grandfather Collin Simanga Gumede at 20792 Pumula South, Bulawayo. Applicant avers that he has no previous convictions and has no pending cases against him. Applicant wishes to continue with his studies. He contends that it is in the interests of justice that he be granted bail pending his trial. He does not have travel documents and has no intention of absconding from this jurisdiction to avoid trial. Applicant states that from the time

of his arrest he has co-operated with the police in their investigations. Applicant prays that he be released into the custody of his *defacto* guardian Collins Simanga Gumede.

SUBMISSIONS BY THE RESPONDENT

The state opposes the granting of bail pending trial on the following grounds as set out by the Investigating Officer as follows;

- (a) Applicant's parents reside outside Zimbabwe and there are high chances that his parents might remove him from this jurisdiction.
- (b) Applicant's safety out of custody is in danger from the deceased's family who may be inclined to avenge their son's death.
- (c) The seriousness of the offence may result in a conviction and a lengthy prison sentence. This may induce the applicant to abscond if granted bail.
- (d) Applicant's parents and his *de facto* guardian one Collin Simanga Gumede do not own a house in Bulawayo and hence applicant is a flight risk.

APPLICABLE LAW

The proper approach is to allow bail pending trial and safeguard the liberty of an accused person where this can be done without endangering the administration of justice. The likelihood of the applicant absconding should be taken into consideration. See *S v Williams* 1980 ZLR 466 (S).

In bail applications the primary question for consideration is whether the applicant will stand trial or abscond. The court should always lean in favour of granting bail where possible. See: *S v Biti* 2002 (1) ZLR 115 (H).

The general approach in bail applications is to strike a balance between the interests of society and those of the applicant. In *S v Bhebhe & Ors* 2002 (1) ZLR 137 (H), the court held that fears of the safety of the accused because of the unlawful actions of a mob outside the court room, threatening to kill the accused were not sufficient ground for refusing bail. The state should not give the impression in any circumstances that the rights of ordinary citizens can be trampled upon to give way to the unlawful actions of members of the public.

In terms of section 50 (1) of the Constitution of Zimbabwe (Amend) (20), 2013, an applicant is entitled to bail pending trial unless there are compelling reasons justifying their continued detention. It is trite that the seriousness of an offence on its own is not a ground for denying bail to applicant pending him trial. See: *S v Hussey* 1991 (2) ZLR 187 (S) & *Aitken & Anor v Attorney General* 1992 (1) ZLR 255.

In *State v Kuruneri* HH 111-04, the learned Judge held that:

“It is because of the presumption of innocence that the courts are expected, and indeed required to lean in favour of the liberty of the accused.”

APPLICATION OF THE LAW TO THE FACTS

The applicant in this matter is a juvenile aged 17 years. In considering this bail application the court must be alive to the fact that although there was loss of life, the court must not apply the might of the criminal justice system on a juvenile. The presumption of innocence still operates in favour of the applicant. The applicant’s mother and father are separated. Applicant’s mother spends most of her time in South Africa. Applicant’s mother stays with another man. Applicant and his biological father have no real connection. His whereabouts are unknown. Applicant resides with his *de facto* guardian and grandfather, Collin Simanga

Gumede. Applicant's grandfather has agreed to take the applicant into his custody if granted bail. Applicant has submitted that he is in no danger and is unlikely to be harmed by deceased's family if granted bail pending trial. It has been submitted by applicant's legal practitioner, *MrBushe*, that applicant's family were ordered by deceased's family, to pay 10 herd of cattle as compensation for the death of the deceased. One beast has already been paid towards such compensation. This is in terms of the parties' beliefs and culture. The state has not established that there is a danger of abscondment by means of any credible evidence. It has been shown that seriousness of an offence on its own is a sufficient ground for denying bail in the circumstances of this case.

MrGuveya, appearing for the state, contends that since applicant is facing an offence specified under Part 1 of the Third Schedule to the Criminal Procedure and Evidence Act, applicant must discharge the onus upon him to show that he is a good candidate for bail. Further, applicant must demonstrate that there are exceptional circumstances, which in the interests of justice warrant his release on bail. I am satisfied that applicant has discharged the onus. Applicant is a juvenile aged 17 years. His continued detention is not desirable. Applicant has proffered a defence to the charge that is recognisable at law. Applicant's family has engaged deceased's family to attend to customary rituals in accordance with their beliefs and custom. The court has interviewed Collins Simanga Gumede who has confirmed that he is prepared to take the juvenile into his custody pending trial.

DISPOSITION

The court is satisfied that applicant is a suitable candidate for bail. In the exercise of its inherent discretion in matters of bail, this court is inclined to lean in favour of the liberty of the applicant. The presumption of innocence still operates in his favour.

In the result and accordingly,

It is ordered as follows:-

1. Applicant is ordered to pay RTGS \$100 000 as bail deposit to the Registrar of the High Court.
2. Applicant is to reside at 20792 Pumula South, Bulawayo, until the finalization of this case.
3. Applicant be and is hereby released into the custody of Collin Simanga Gumede.
4. Collin Simanga Gumede be and is hereby ordered to keep the applicant in his custody and is further ordered to take applicant to the Bulawayo Magistrates Court and or any court in connection with this case when required to do so.
5. Applicant shall report at Pumula South Police Station once every month on Saturdays between the hours of 6 am and 6 pm and in that regard Collin Simanga Gumede is ordered to take applicant to Pumula South Police Station as directed by this court.
6. Applicant shall not interfere with state witnesses.