

**TILTON MOYO**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 19 DECEMBER 2022 & 12 JANUARY 2023

**Application for bail pending trial**

*Ms. Shirichena-Chivunze*, for the applicant  
*B. Gundani*, for the respondent

**DUBE-BANDA J**

1. This is an application for bail pending trial. The applicant is charged with the crime of murder as defined in section 47 (1) of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 3<sup>rd</sup> November 2022 at around 2300 hours at Msotsha Bar, Nkankezi Business Centre, Filabusi the accused acting in common purpose with an accomplice still at large caused the death of Benito Dube (deceased). It is alleged further that the applicant stabbed the deceased with an Okapi knife, once on the back, once on the left side of the stomach, and once on the right side of the stomach. The accomplice struck the deceased with a machete several times on the head.
2. In support of his bail application, the applicant filed a bail statement. In his statement he avers that he tried to stop a fight between the deceased and his friends on one hand and one Witness Mangena on the other hand. The deceased struck him with a stone on the forehead and he fell down. Thereafter the deceased stabbed him using an okapi knife. The applicant denies stabbing the deceased or physically attacking him, and that it is this Witness Mangena who struck the deceased with a machete.
3. The applicant avers further that he is not a flight risk. After he was discharged from United Bulawayo Hospitals, he handed himself over to the police. He is of fixed abode, he has no passport or any connections outside the country. Counsel argued that the applicant is a good candidate to be released on bail pending trial and urged this court to accede to this application.

4. This application is opposed. In support of its opposition the respondent relied on the affidavit of the investigating officer. Mr *Gundani* counsel for the respondent submitted that there are compelling reasons to refuse to grant applicant bail. It was contended that the applicant is facing a very serious offence of which if convicted he is going to be sentenced to a long prison term. It was contended further that there is a strong *prima facie* case against him, in that there are four eye witnesses who saw him committing this offence. Counsel submitted that the gravity of the offence and the gravity of the likely penalty coupled with the strong evidence against him is incentive enough for him to abscond.
5. The first issue to determine is whether the State has a strong *prima facie* case against the applicant? The investigating officer in his affidavit avers that the applicant and one Witness Mangena had a misunderstanding with the deceased over a long outstanding dispute of gang rivalry. The deceased withdrew an okapi knife, and the applicant went outside the bar and returned armed with a stone. The applicant threw the stone at the deceased and missed him, and the latter picked that stone and struck the applicant causing him to fall down. Witness Mangena joined the fight and struck the deceased with a machete several times all over the body. The applicant rose from his fall and used an okapi knife to stab the deceased once on the back, once on the left side and once on the right side of the stomach. The deceased died on admission to hospital.
6. Mr *Gundani* tendered from the bar an unsigned statements of Albert Ncube and Busani Nyathi. Nothing turns on the admissibility of these statements, because in bail proceedings hearsay evidence; statements made from the Bar and affidavits are all admissible, it remains a matter of probative value or weight of such evidential material. The unsigned statements are admissible, it remains a question of weight, i.e. what weight should be attached to such statements. In the statements it is said the deceased was the first to draw an okapi knife, which prompted the applicant to go outside of the bar and pick a stone, which he threw at the deceased and missed him. The deceased picked the same stone, struck the applicant causing him to fall down. Witness Mangena then struck the deceased with a machete and the applicant stabbed him with an okapi knife.
7. The applicant says the deceased struck him with a stone and he fell down, and thereafter he was stabbed with an okapi knife. The fight happened on the 13 November 2022. The police “Request for Medical Report” compiled at 0049 hours on the 14 November shows that the

applicant was stabbed once on the right side of the stomach and assaulted once on the left eye. He suffered a deep cut on the right side of the stomach and a swollen eye. The medical documents also show that he had some injuries on the armpit and was admitted at United Bulawayo Hospitals from 14 November 2022 to 19 November 2022 due to stab wounds. He denies having stabbed the deceased.

8. On the facts of this case, and solely based on the material before court at this stage it does not seem to me that the State has a strong *prima facie* case against the applicant. I say so because the applicant's version is corroborated by the "Request for Medical Report" and the medical documents on record. It is also to some extent corroborated by the investigating officer and statement of Albert Ncube, that the deceased drew an okapi knife and that he struck the applicant with a stone and he fell down. The question whether the applicant stabbed the deceased in the manner described by the investigating officer and Albert Ncube is not for this court to decide at this stage of the proceedings. Where a bail applicant has established a defence which has reasonable prospects of success at the trial, this is a factor favouring bail. See: *S v Mohammed* 1999 (2) SACR 507 (C). My view is that the applicant has established such a defence, which has reasonable prospects of success at the trial.
9. There is no doubt that the applicant is charged with a serious offence, and that upon conviction there is a likelihood of a severe sentence. Whilst I accept that the possibility of absconding is always a very real danger in cases where long terms of imprisonment are likely to be imposed, it remains the duty of the court to weigh up carefully all the facts and circumstances pertaining to the case. On the facts and circumstances pertaining to the case the risk of flight is negated by the fact that the State does not appear to have a strong *prima facie* case against the applicant. I also factor into the equation that the applicant immediately after release from hospital handed himself over to the police. Further the bail conditions have to be structured in such a way as to ally the fear of flight.
10. I do not think admitting the applicant to bail will undermine the objectives of bail and the criminal justice system. I say so because it appears that he himself was a victim of a vicious stone attack and a vicious okapi knife attack which attack necessitated hospitalisation from 14 November 2022 to 19 November 2022.

11. In *S v Acheson* 1991 (2) SA 805 (Nm) MOHOMED J remarked as follows (at 822A-B):

An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.

12. The State has not shown that the release of the applicant is likely to prejudice the ends of justice. The cumulative effect of the facts of this case constitute a weighty indication that bail should be granted.

13. Therefore, upon careful consideration of all the facts and the circumstances based on the facts and evidence before me I am satisfied that the interests of justice do permit the applicant's release from custody. There is no likelihood that the applicant will abscond and evade trial.

14. In conclusion I find that on a conspectus of the facts and all the evidence placed before court, I am of the view that it is in the interests of justice to release the applicant on bail pending trial.

In the result I order as follows:

The applicant be and is hereby admitted to bail on the following conditions:-

- i. That he pays a bail deposit in the sum of ZWL20 000.00 to the Clerk of Court, Gwanda.
- ii. That he resides at his homestead, Village 10 Nkankezi Area, Filabusi until the finalization of this matter.
- iii. That he reports at Filabusi Police Station once every fortnight between 6am and 6pm until the finalization of this matter.
- iv. That he does not interfere with police investigations and State witnesses.

**It is so ordered.**

*Shirichena-Chivunze*, applicant legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners