

THE STATE  
versus  
DZIKAMISAI GWARISA

HIGH COURT OF ZIMBABWE  
MAWADZE J  
MASVINGO, 12 June 2023

### **Bail Application**

*L. Mudisi*, for the applicant

*B. E Mathose*, for the respondent

MAWADZE J: Some two years ago, specifically on 26 March 2021 I dismissed applicant's application for bail pending trial. I gave detailed reasons *albeit ex-tempore*.

On 8 June 2023 I received a letter from Mr Mudisi, counsel for applicant requesting written reasons for dismissing the application for bail pending trial. I now proceed to give the written reasons.

The 31-year-old applicant is jointly charged with one Takesure Picture Muzama aged 28 years. They are both facing one count of murder as defined in section 47 (1) of the Criminal Law Code [*Chapter 9:23*] and two counts of robbery as defined in section 126 (i) of the Criminal Law Code [*Chapter 9:23*]. The other alleged accomplice is said to be at large.

#### The allegations

In respect of count 1 of murder the applicant and his two accomplices are said to have been on a prawl in Zvishavane on 28 January 2021 looking for people to rob. It is alleged that they met the now deceased Collet Vengai Moyo who was from work and pounced on him. The now deceased is said to have unsuccessfully tried to flee and was tripped. A sharp object was then used to strike him and also stones were used to hit him on the head. He was undressed and his trousers and safety shoes removed. It is said the applicant and his accomplices also stole from him an Itel 2160 cellphone. The now deceased was left unconscious and bleeding. The now deceased's

workmate managed to ferry him to Shabani hospital from where he was later transferred to UBH in Bulawayo where he passed on 5 February of the injuries sustained. The cause of his death is said to be skull bone fracture and sub-dural haematoma caused by the head trauma.

The applicant is linked to this murder charge in that the now deceased's cell phone was later recovered. This was after the police used its IMEI number to trace it and discovered it was being used by one Washington Gwarisa who in turn led the police to Moreblessing Moyo who had been given the cell phone by the applicant. It is said the applicant upon his arrest also implicated his alleged accomplice Takesure Picture Muzama and led police to house number 3111, Izayo Park, Zvishavane where the alleged accomplice was arrested.

The applicant who is denying this murder charge said that indeed he was in possession of the said cell phone belonging to the now deceased the ITEL 2160, but that he had bought it from some unknown cell phone dealer for US \$5 in Zvishavane whom he said he can only facially identify.

In count 2 of robbery, it is said on 2 February 2021 the applicant and his accomplices approached the complainant at his residence in Zvishavane who was seated on the veranda at about 2000hrs. The complainant was eating sadza. A stone was used to strike the complainant on the forehead. The applicant and his accomplices allegedly produced knives demanding property. As a result, the complainant was robbed of an Eco radio and a memory stick. The applicant was arrested after a tip off. Further the applicant's linked to this offence in that the radio was recovered upon his arrest.

In count 3 of Robbery, it is said on 2 February 2021 at 2100hrs the complainant was having quality time in her car with her boyfriend whilst parked near SDA church, Kandodo in Zvishavane. It is said applicant and his accomplices approached the said lovebirds, smashed the car window causing the complainant's boyfriend to flee. The complainant was unlucky as it is said she was caught and stabbed three times on her thigh and once on the waist as the assailant's demanded money. The complainant was robbed of her Samsung Note 4 Galaxy cell phone, an ITEL cell phone, and modulator. It is said upon the applicant's arrest an A 561 ITEL cell phone belonging to the complainant was recovered.

The applicant's defence in respect of count 2 and 3 of Robbery is one of an *alibi*. The applicant said on the alleged dates the offences were committed he was far away from Zvishavane.

He said he was in Mberengwa where he was engaging in illegal gold mining. The applicant said this was during the Covid lockdown and he only travelled back to his residence in Zvishavane at No. 06 B, Maglas after the relaxation on the Covid 19 Regulations.

As regards the allegation of trying flee after his arrest the applicant denied this stating that all he tried to do was to go to the toilet.

The applicant insisted that he is a suitable candidate for bail and should be admitted to bail on the specified conditions.

#### The Evidence

The application for bail was opposed by the state primarily on three grounds. Firstly, it was contended that applicant is facing very serious offences punishable with lengthy custodial terms or even a death penalty in count 1 of murder.

Secondly the state argued that the case against the applicant is very strong. Lastly it was submitted that the applicant is likely to abscond.

In order to buttress its case, the state called D/sgt Tavaya to testify.

Detective sergeant Tavaya said the complainant's cell phone in CTI had been used at one stage or another by the applicant's wife and applicant's father soon after the murder of the applicant. Further he said there was an eye witness to the murder in count 1 Sibulisiwe Moyo who saw the now deceased being attacked by the applicant and his alleged accomplices at the scene.

In relation to the robbery cases detective sergeant Tavaya said the victim's property being the Eco radio and cell phone were recovered from the accused's residence after his arrest.

Detective sergeant Tavaya said the applicant is a very mobile gold panner and that the police only managed to arrest him after a tip off. He said the applicant resisted arrest and that it took 10 to 15 minutes for 4 detectives to subdue and arrest him.

*Mr Mudisi* for the applicant did not meaningfully challenge the evidence of detective sergeant Tavaya. In fact, detective sergeant Tavaya said the applicant actually threatened with death if the witness disclosed that he saw in count 1. Further he said the applicant may also influence or threaten both his girl friend and father who are state witnesses.

#### The Law

The law in relation to bail pending trial is now a well beaten path.

In terms of section 50 (i) (d) of the Constitution bail pending trial is a right. It can only be taken away if they are compellable reasons. What constitutes compelling reasons is to a great extent outlined in section 117 (2) of the *Criminal Procedure and Evidence Act [Chapter 9:07]*.

The admission of an applicant to bail pending trial is not premised on his or her guilty or innocence of the offence charged. The basis upon which bail pending trial is granted is to ensure that an accused would stand trial and would not interfere with investigations. Indeed, each case is to be determined on its own merits.

The onus rests on the State to establish compelling reasons. All the applicant is expected to do is to show that the reasons advanced by the state are not cogent or compelling.

It is important to appreciate that at this stage the presumption of innocence operates in favour of the applicant or accused. Indeed, the court at this stage is not expected to give a definitive or decisive assessment of an accused or applicant's defence to the charge preferred. All the accused or applicant is expected to do is to take the court into his or her confidence by preferring a *prima facie* plausible defence to the allegations and show that he is a proper candidate for bail. This is normally achieved by giving a brief defence to the charge. This is in line with best the international practice and resonates with International Instruments as is enshrined in Article 11 of the *Universal Declaration of Human Rights 1948* and Article 14 (2) of the *International Convention on Civil and Political Rights 1966*.

#### Applying the facts to the law

There can be no doubt that the charge of murder and robbery are serious offences. Be that as it may the seriousness of the offence alone is not a compellable reason to deny an applicant bail. This is so as the applicant is presumed innocent at this stage see *State v Hussey 1991 (2) ZLR 187 (5)*.

From the evidence of the investigating officer the state case is indeed strong as the applicant is clearly linked to the offences especially through the recovered property belonging to the now deceased and the complainants. In respect of the murder charge the applicant does not dispute that the applicant's cell phone was recovered from a person he gave cell phone. However, the applicant puts into issue how the state alleges he acquired it. The applicant has proffered a *prima facie* defence which may need to be properly digested by the trial court. There is no much clarity as regards the said evidence of the eye witness to the murder.

The applicant has not bothered for explain the alleged recovery of victim's clothes and radio at his residence despite his *alibi*. What further complicates the applicant's case is that the now deceased's shoes are said to have been brought to the police by the applicant's girlfriend. However, one may still give the applicant the benefit of the doubt.

The applicant has not sought to rebut the evidence that he threatened an eye witness to the murder with death. As regards his girlfriend and father it has not been said that he actually threatened them.

It is the fear that the applicant can not be trusted that he would stand trial if released on bail which tilts the scale in favour of the State.

Despite being a person of fixed abode, the applicant engages in gold panning. Like all such gold panners or the so-called artisanal miners he is nomadic. The evidence shows the police had to rely on a tip off to arrest him despite being a person of fixed abode.

To make matters worse applicant has not seriously disputed that he resisted arrest and tried to flee from the four detectives. Could a person who struggled with the Police Officers for 10 to 15 minutes resisting arrest be trusted to stand trial if released on bail. Clearly no reasonable court can repose its trust in such an accused person or applicant.

The applicant's conduct of being difficult to locate, resisting arrest, trying to flee and his failure to a great extent to give any discernable explanation to how he is linked to these offences create compellable reasons to deny him bail. The applicant exhibited clear conduct that he is a flight risk. It is therefore not in the interest of justice to admit such as applicant to bail.

It is for these reasons that the application for bail pending trial can not succeed and is dismissed.

MAWADZE J

*Mutendi, Mudisi & Shumba*, applicant's legal practitioners

*National Prosecuting Authority*, respondent's legal practitioners