

**LIZWE MUNENGE**

**And**

**ELIJAH PHIRI**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 24 MAY 2022 & 26 MAY 2022

**Application for bail pending trial**

*Ms. M. Nyika*, for the applicants

*Ms. Ngwenya*, for the respondent

**DUBE-BANDA J:**

1. This is an application for bail pending trial. Applicants with other persons who are not part of this application are being charged with two counts, in count 1 they are charged with the crime of contravening section 82(1) of the Parks and Wildlife Regulations S.I. 326/1990 as read with 123 (1) (B) of the Parks and Wildlife Act [Chapter 20:14] (acquire, possess, sell or transfer raw unmarked ivory without a permit). It being alleged that on the 27 April 2022, at around 1800 hours accused 1, 2, 3 and 4 who are not part of this application were spotted along Dete-Binga road each carrying one elephant tusk each. Upon failing to produce a permit, they were arrested. The four accused persons implicated these two applicants in the commission of this offence. Indications led to a base in the bushes, applicants were found at such base and were arrested.
2. In count 2 they are charged with the crime of contravening section 4(1) of the Firearms Act [Chapter 10:09] (purchase, acquire or has in his possession any firearm or ammunition without a firearm certificate). It being alleged that a search was conducted at the base leading to the recovery of two unlicensed firearms, an AK-47 with a magazine loaded with 29 rounds with an unidentified serial number, and a point 375 rifle with serial number 7256042.
3. In support of their bail application applicants filed a bail statement. In their bail statement they contend that it is in the interests of justice that they be released on bail pending trial. Applicants are denying the charges they are facing. They contend that 1<sup>st</sup> applicant had visited 2<sup>nd</sup> applicant, and on their way to a bar they met the 4<sup>th</sup> accused who informed them that he was looking for

labour to slaughter an animal. They were promised payment of USD20 each and meat for their families. They took the offer and they were taken to the bush where they saw a half done carcass. They started cutting the meat, and had a target to finish before sunset. Accused 4 left them cutting the meat. He then later returned with three other persons and police officers. The three other persons are accused 1, 2 and 3. Applicants contend that they were neither in possession of ivory nor firearms. They contend further that they do not even know how to use a firearm. They dispute that at arrest they tried to flee, and they say they were not violent.

4. The release of the applicants on bail is opposed. It is contended that there are compelling reasons to refuse to release applicants on bail pending trial. In support of its opposition respondent relies on the affidavit of the Investigating Officer. The anchor of the opposition is that applicants are a flight risk. It is contended that applicants are facing a very serious offence of which upon conviction the sentence is a lengthy term of imprisonment; there is a strong *prima facie* case against the applicants in that they were arrested at a base in the bush, i.e. they were caught *flagrante delicto*. It is submitted that the seriousness of the offence, the prospects of a conviction and upon a conviction the imposition of a long prison term are incentives enough for the applicants to abscond.
5. In his affidavit the Investigating officer avers further that applicants attempted to flee at arrest and exhibited violent tendencies against the arresting details. It is said they have more bases in the bush which are being investigated, and if released may interfere with investigations.
6. The fundamental principle governing the court's approach to bail applications is to uphold the interests of justice. The court must take into account the factors set out in section 117 of the Criminal Procedure and Evidence Act [Chapter 9:07] and try to strike a balance between the protection of liberty of the individual and the administration of justice. Section 117 says the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established, where there is a likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or not stand his or her trial or appear to receive sentence; or attempt to influence or intimidate witnesses or to conceal or destroy evidence; or undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system.

7. In our law persons are presumed innocent until their guilty has been proved. Whenever the interests of justice will not be prejudiced by pre-trial release the courts should lean in favour of liberty and grant release on bail. This is particularly so if the offence in which the accused is being charged is not likely to attract a prison sentence. See: Prof. Feltoe *Magistrates' Handbook* (Revised 2021) 76.
  
8. This application is opposed on the grounds that if released on bail, the applicants will abscond and not stand their trial. In deciding whether flight is likely and in the absence of concrete evidence of a predisposition to abscond, account must be taken of a number of factors which common experience have shown might influence a person either to stand trial or abscond. See: Prof. Feltoe *Magistrates' Handbook* (Revised 2021) 77. When assessing the risk of an applicant for bail absconding before trial, the court will be guided by the following: the gravity of the charges and the severity of penalties which would be likely to be imposed if convicted; the apparent strength or weakness of the State case; applicant's ability to flee to a foreign country, whether he has contacts in the foreign country who will offer him sanctuary and the absence of extradition facilities in that country; whether he has substantial property holdings in Zimbabwe and his status in Zimbabwe, that might mean he would lose so much if he absconded that flight is unlikely; whether he has substantial assets abroad; if he was previously released on bail, whether he breached the bail conditions; and the assurance given that he intends to stand trial. See: *S v Jongwe* 2002(2) ZLR 209(S), *S v Chiadwa* 1988(2) ZLR 19 (S), *Aitken & Anor v A-G* 1992(1) ZLR 249 (S).
  
9. In *casu* count 1 and 2 are grave and very serious and if convicted the applicants will likely be sentenced to long prison terms. What remains to be considered is the apparent strength or weakness of the State case. It is not in dispute that the applicants were arrested in the bush and at a base, it appears to me, and for the purposes of this application only that this is the base from where the illegal hunting activities are co-ordinated. Firearms including AK-47s and rounds of ammunition were found at this abase. Applicants contend that their presence at the base was innocent in that they were hired by accused 4 to slaughter an animal. It will be for the trial court to decide, on the evidence before it whether applicants' version is reasonable possible true, however for the purposes of this application I take the view that the State has a strong *prima facie* case against the applicants.

The finding that the State has a strong *prima facie* case is not the end of the inquiry. 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 guilty has been established in court. The court will ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.

10. Ms *Nyika* counsel for the applicants argued that there is no chance of applicants absconding and evading their trial. This argument is anchored on the following: it is said applicants have neither passports nor any travel documents, they have no means of uprooting themselves from Zimbabwe and establishing themselves in another country beyond the jurisdiction of this court.
11. Each case must be considered on its merits. On the facts of this case I am of the view that applicants are flight risks. They are facing two very serious charges of which upon conviction they are very lightly to be sentenced to lengthy terms of imprisonment. I accept the evidence of the Investigating Officer that applicants attempted to flee at arrest and exhibited violent tendencies against the arresting details. The temptation for the applicants to abscond if granted bail is real. See: *S v Jongwe* SC 62/2002. It is contended further that they have more bases in the bush which are being investigated, and if released may interfere with investigations. I do not think that such interference as alluded to by the officer can be restrained by the imposition of bail conditions. These bases are in the bush, on the facts of this case I do not see how they can be restrained from going to the bush. Furthermore, the applicants are not only a flight risks but their release on bail given the serious allegations against them that they were found in the bush at a base with firearms, in including AK-47s, arms of war and rounds of ammunition will undermine the objective and proper functioning of the criminal justice system and the bail institution. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.
12. Taking all the evidence into consideration and weighing that evidence against the applicants' defence and personal circumstances, together with the submissions made on their behalf, I hold the view that the administration of justice will be prejudiced if the applicants were released on bail. On facts of this case refusal of bail does not amount to anticipatory punishment.

In the result, I order as follows:

The application for bail be and is hereby dismissed and applicant shall remain in custody.

*Mhaka Attorney*, applicant's legal practitioners

*National Prosecuting Authority*, respondent's legal practitioners