

MGCINI LUNGA v THE STATE**Versus****THE STATE**

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 24 JUNE 2022 & 30 JUNE 2022

Application for bail pending trial

Applicant in person
Ms. Mabhena for the respondent

DUBE-BANDA J:

1. This is an application for bail pending trial. Applicant is being 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 applicant caused the death of his wife Niccolah Mabvure (deceased) by stabbing her with a kitchen knife. The deceased suffered deep cuts on the neck, stomach and the right cheek. She bleed and died at the scene of crime.
2. In support of his bail application, applicant filed a bail statement and made oral submissions. In his bail statement he contends that he resides at house number 2336 Cowdry Park, Bulawayo; thirty years old; he is a widow with one four year old child; he is employed as a tax-driver; he has no previous convictions or any pending court cases in any court in Zimbabwe; he is not a holder of any valid passport; he did not evade arrest and he co-operated with the police investigations and he is willing to abide by any bail conditions. Applicant said if he is released on bail he will not abscond.
3. In brief, his defence to the allegations is that when he returned home from work he found that his wife had been stabbed to death. He then called his relatives, mother and the police for assistance. He does not know how and why his wife was killed. He was forced by the police to admit to the charge.

4. He contended that if released on bail he will not interfere with witnesses nor do anything that will jeopardize the proper administration of justice. He will not reside at the same address with State witnesses where the crime occurred, he will reside at number 2336 Cowdry Park, Bulawayo.
5. In his submissions in court, applicant argued that the interest of justice will not be defeated if he is released on bail. He has substantial and sufficient interest in the county for him to abscond. He reiterated that he found his wife having been stabbed and that there was a kitchen knife close to her body. Prior to his wife being stabbed there is a man who was phoning and threatening him and his family. Pruned to its bare bones, applicant's contention is that this is the man who caused the death of his wife, and therefore the State has no strong *prima facie* case against him.
6. This application is opposed. It is contended that it is not in the interests of justice that applicant be released on bail because he is a flight risk. In support of its opposition the respondent filed an affidavit deposed to by the investigating officer, applicant's confirmed warned and cautioned statement, a statement taken from applicant's aunt, a another statement taken from his mother and another one from his neighbour. On the strength of these it is contended that applicant is facing a serious offence, and the State has a strong *prima facie* case against him and if convicted he will face a lengthy term of imprisonment and this will induce him to abscond and evade the reach of justice.
7. 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 will abscond, 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.

8. In our law persons are presumed innocent until their guilt 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. In *casu* is convicted applicant will likely serve a long prison term if not the maximum punishment prescribed by law in this jurisdiction.
9. 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).

10. In *casu*, applicant is facing a grave and very serious offence and if convicted he will likely be sentenced to a long prison term. What remains to be considered is the apparent strength or weakness of the State case. In his confirmed warned and confirmed statement applicant explained in detail and in graphic terms the reasons and how he stabbed now deceased causing her instant death. He explained that he stabbed her with a kitchen knife. The reason for the stabbing was that she was pregnant by another man, and she had nude pictures of herself and a man on her phone, and there were messages from some man who were saying they had sexual intercourse with her. After he stabbed deceased he told his mother and aunt about what he had done. He told them the reasons why he stabbed her.
11. Applicant now denies that he committed this crime. It is his right to deny the charge, plead not guilty and ask the State to prove his guilt beyond a reasonable doubt. But, for the purposes of this application I am of the view that in this case the evidence against the applicant is very cogent, if not overwhelming. On these facts and for the purposes of this application I take the view that the State has a strong *prima facie* case against the applicant.
12. On the facts of this case I am of the view that applicant is a flight risk. Murder is a very serious offence and upon conviction, and in terms of the law he may be sentenced to death or to a very lengthy term of imprisonment. This may be so because of the nature and the seriousness of the wounds; the vulnerability of the part of the body to which the stabbing was directed; the degree of force that must have been used to inflict such wounds. In the circumstances the temptation for the applicant to abscond if granted bail is irresistible. See: *S v Jongwe* SC 62/2002. Applicant is a flight risk.
13. Taking all the evidence into consideration and weighing that evidence against the applicants' defence and personal circumstances, together with the submissions made on his behalf, I hold the view that the administration of justice will be prejudiced if the applicant is released on bail. On a conspectus of the facts and all the evidence placed

before court, I am of the view that it is not in the interests of justice that applicant be released on bail pending trial.

In the result: the application for bail be and is hereby dismissed and applicant shall remain in custody.

National Prosecuting Authority respondent's legal practitioners