

HENRY MUGOVE MURINGANI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 14 & 20 July 2022

Bail Appeal

L Madhuku with *M Nyatsoma*, for the appellant
W Mabhaudhi, for the respondent

CHIKOWERO J:

INTRODUCTION

1. This is an appeal against the magistrates court's dismissal of a bail application pursuant to a finding that there were no changed circumstances.

THE BACKGROUND

2. The appellant is a principal law officer employed by the National Prosecuting Authority.
3. On 28 February 2022 he appeared before the magistrates court sitting at Harare on two counts of criminal abuse of duty as a public officer as defined in section 184(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code) as well as two alternative counts of defeating or obstructing the course of justice as defined in s 184(1)(a) and (c) of the same Act.
4. The allegations were that he had crafted false State papers (while retaining the genuine Criminal Record Book numbers in a matter wherein one Tatenda Tawanda Mutengo was charged with the offences of robbery committed in aggravating circumstances and unlawful possession of a firearm and ammunition). Mutengo had been denied bail by the High Court and was detained at Chikurubi Prison. The fictitious State papers allegedly authored by the appellant purported that Mutengo was charged with the crimes of attempted murder and rape. The appellant handed up the offending documents to one Eliah Tatenda Murenzvi

(uncle to Mutengo). The latter in turn delivered them to the inmate, Mutengo, who used them to successfully make two bail applications at the High Court. There were mobile phone calls between Murenzvi and the appellant. The former paid the latter for the services rendered. The amounts so paid are set out in the Request for Remand Form.

5. At his initial appearance before the magistrates court (on 28 February 2022) the appellant made an unsuccessful bail application. The court found that he will not stand trial if released on bail, that he will interfere with State witnesses and that he will commit further offences. He did not appeal against the decision. The Criminal Record Book number for the matter is Acc 56/22.
6. On 6 April 2022 he filed another application for bail before the same court on the basis of changed circumstances. This was twenty one working days since the initial bail application had been dismissed.
7. He cited three reasons as constituting the new facts. These were:
 - the passage of time from the date that the original application was refused.
 - that there was no longer any fear that he would interfere with state witnesses since the police had finished recording statements from those witnesses.
 - that the State's case had since weakened.
8. The application was argued on 11 April 2022 and was dismissed on the same date. The court concluded that there were no changes in the circumstances.
9. Aggrieved by the decision, he filed this appeal. His grounds of appeal read as follows:

“GROUNDS OF APPEAL

 14. The court *a quo* misdirected itself and improperly exercised its discretion in making a final finding that there were no changed circumstances yet it had made findings, in the course of its reasoning, that there were changed circumstances.
 15. The court *a quo*'s decision to deny bail on the basis of that there were no changed circumstances was so outrageous in its defiance of logic or common sense that no reasonable court, applying its mind to the facts and conscious of the right to liberty, could ever have reached that conclusion.
 16.
 17. The court *a quo* misdirected itself in law in failing to comprehend the nature of a bail application on changed circumstances, in that it considered its previous findings for denying bail before determining whether or not there were changed circumstances.”
10. In the bail statement, the appellant elaborated the grounds of appeal as follows:

- “19. The appellant approached the court a quo seeking bail on the basis of changed circumstances. His focus was on three main changed circumstances namely (i) passage of time; (ii) that the State had recorded statements and (iii) a weakening State case.
19. In its ruling ...the court a quo vacillated between finding that there were no changed circumstances and agreeing that there were changed circumstances and then concluding that there were changed circumstances.
20. In the result, the court a quo denied bail without following the proper procedure for determining the application before it.”
11. In submissions, Mr *Madhuku* essentially spoke to the grounds of appeal. Mr *Mabhaudhi* vigorously defended the judgement appealed against.

THE ISSUES A QUO

12. After everything has been said and done, the magistrates court had to determine whether the following constituted changed circumstances:
- the passage of time
 - that the State had recorded statements from its witnesses
 - whether the State case had been weakened
13. My view is that the court a quo dealt with all three issues. Whether the learned magistrate’s style in undertaking that exercise finds favor with the appellant is besides the point. This is an appeal in the narrow sense.

THE APPELLATE COURT’S APPROACH IN AN APPEAL AGAINST REFUSAL OF BAIL

14. In an appeal of this nature this court can only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision. See *S v Madamombe* SC 117/21; *Aitken & Anor v Attorney General* 1992(1) ZLR 249(S); *S v Chikurumbike* 1986(2) ZLR 145(S).

THE ISSUES ON APPEAL

15. Although the weakening or otherwise of the State case was an issue before the magistrates court, it is not an issue before me.
16. I agree with Mr *Madhuku* that this is so because there is no ground of appeal attacking the magistrates court’s finding in that regard. Indeed, further elaboration of a ground of appeal, in a bail statement, is not synonymous with the ground of appeal itself.

17. This means that I am restricted to determining whether the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision in finding that the passage of time and the recording of witness statements, singly or jointly, were not changed circumstances.
18. Only if the appellant surmounts this first hurdle can I then proceed to exercise fresh discretion and decide whether, on the same materials as were before the learned magistrate, the appellant should be admitted to bail.
19. If the appellant fails at the first stage then the appeal will be dismissed without further ado.
20. With this in mind, I turn to consider the grounds of appeal.

THE PASSAGE OF TIME

21. It is not the mere passage of time that may constitute changed circumstances. Rather, it is the passage of some considerable time. The question of whether there has been progress in the investigations only comes into play where some considerable time has elapsed between the date when bail was originally refused and the date when another application for bail is launched. See *Hitschmann v State* B 319/16.
22. Similarly, whether the case for the prosecution has been strengthened only arises after a considerable period since bail was last refused. *State v Stouyannides* 1992 (2) ZLR 126 (S).
23. This is so because an application for bail on the basis of changed circumstances which comes hot on the heels of a refusal of bail may, for all intents and purposes, be an appeal against bail refusal disguised as an application for bail on the basis of changed circumstances.
24. In the present matter, the application for bail on the basis of changed circumstances was filed twenty-one working days after bail was originally refused.
25. The view that I take of the matter is that, in view of that short period, the magistrate should simply have concluded that the passage of time was not a change in the circumstances.
26. Indeed, he found that the estimated six week period indicated in the Request for Remand Form for completion of investigations had not even run out at the time that the application for bail on the basis of changed circumstances was launched.

27. The magistrate found that the case for the prosecution had been strengthened over the twenty-one days since the evidence that the police had recovered records of call histories between the appellant and Mutengo's uncle had not been challenged. That the learned magistrate proceeded this far was not even necessary in my view.
28. The passage of time should simply have been found not to have been a changed circumstance on the basis that it was too short.
29. All the same, I do not agree with Mr *Madhuku* that the magistrate reasoned that the passage of time was a change in the circumstance and yet found that it was not. What the appellant has effectively done is to cherry-pick portions of the judgement resulting in predicating his submissions on a distorted reading of the judgement.
30. I agree with Mr *Mabhaudhi* that the magistrates court neither committed a misdirection, an irregularity nor did it exercise its discretion unreasonably or improperly in finding that the passage of time was not a changed circumstance.

THE RECORDING OF WITNESS STATEMENTS

31. This ceases to be an issue for purposes of this appeal on the basis that what ought to have triggered the making of the second bail application was conspicuous by its absence. Dissatisfied with the initial decision to refuse bail, the appellant had effectively come back for a second bite of the cherry.
32. He was riding on the fact that the police had since completed the recording of witness statements. Therefore, so the argument went, he could no longer interfere with witnesses.
33. The learned magistrate determined this issue and found that it was not a changed circumstance.
34. I heard argument relating to that finding.
35. I conclude that it is academic for me to determine the same, because it is no longer an issue.
36. This is so because the appellant was also refused bail on two other grounds which would remain unaffected by advertence to the completion of recording of witness statements and the magistrate's findings thereon *vis-à-vis* change in circumstances.
37. The original bail application was dismissed on two other bases. These are that the applicant will not stand trial and that he will commit similar offences.

38. In the circumstances, the need to determine whether the magistrate committed a misdirection, an irregularity or exercised his discretion unreasonably or improperly in finding that the fact that the police had completed the recording of witness statements falls away.

DISPOSITION

39. The appeal against bail refusal is without merit.
40. I accept also, as proper, Mr *Madhuku's* concession that I should strike off the roll the “appeal” in respect of CRB ACC 81/22. The appellant did not make any application for bail pending trial in respect of the additional four counts of the same offence, being the subject of CRB ACC 81/22, either at first instance or on the basis that circumstances had changed. It follows that he could not appeal against a judgement that never was.

ORDER

41. The appeal against the judgement of the Regional Court Northern Division sitting at Harare in the matter of the *State v Henry Mugove Muringani* case number CRB ACC 56/22 handed down on 11 April 2022 refusing bail on the basis that there were no changed circumstances be and is dismissed.
42. The appeal in respect of the matter of the *State v Henry Mugove Muringani* case number CRB ACC 81/22 be and is struck off the roll.

Chambati Mataka and Makonese, appellant’s legal practitioners
The National Prosecuting Authority, respondent’s legal practitioners