1. ROBERT MARTIN GUMBURA B 157/21
versus
THE STATE

2. BLESSING MAKOMBORERO CHIDUKE B 136/21
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE 16 February 2021.

Application for bail pending review

Applicants in person
R Chikosha, for respondent

CHITAPI J: The above two applications have been consolidated only for purposes of preparing one judgment that disposes of both applications. The motivation for the consolidation is based upon the considerations that both applicants are co-accused in case No. Harare Magistrates court CRB 4105 – 4113/15 wherein they were arraigned for trial with six other co-accused. They are also co-applicants with their co-accused in case No. HC 4098/19 wherein they seek a review of the criminal proceedings.

The applicants and their co-accused were charged with three offences. These are

"Count 1: Attempt to escape from lawful custody (as defined in section 189 (6) as read with section 185 (1) (b) (4) of the Criminal Law Codification and Reform Act, [*Chapter 9:23]*

Count 2: Incitement in aggravating circumstances in relation to malicious damage to property or negligently causing serious damage to property (as defined in section 187 (i) (b) as read with sections 140 and 143 (a) (i) (ii) or (b) (of the Criminal Law (Codification and Reform Act, [*Chapter 9:23*]

Alternatively; Conspiracy in aggravating circumstances in relation to malicious damage to property or negligently causing serious damage to property (as defined in section 188 (1) (b) as read with section 143 (a) (i) (ii) or b (of the Criminal Law Codification and Reform Act, [*Chapter 9:23]*

Count 3: Incitement to assault or resist a peace officer as defined in section 187 (10 (b) as read with section 176 (of the Criminal Law Codification ad Reform Act, [*Chapter 9:23]*

Alternatively: Conspiracy to assault or resist a peace officer as defined in section 188 (1) (b) as read with section 143 (a) (i) (ii) or (b) of the Criminal Law Codification and Reform Act, [*Chapter 9:23.]*

The brief background to the charges was that the applicants and their co-accused were convicts and inmates at Chikurubi Maximum Security Prison and they remain so. It was alleged that on 13 February, 2015 the inmates with applicant Robert Martin Gumbura as leaader incited other inmates to protest the quality of food which they were being fed on at the prison. He allegedly incited the prisoners to protest by singing and hitting cell bars which they did the whole night. A month later on 13 March, 2015 the applicants and their co-accused revived the food protests leading to inmates being disorderly and in the process damaging property resulting in prison officers firing warning shots in an endeavor to restore order. Some officers were injured in the process. It was also alleged that the applicant and co-accused attempted to escape from prison. Some prisoners were shot and some died.

When the applicants and the co-accused appeared before the magistrates court for trial, they pleaded not guilty on 3 September, 2015 and trial commenced. The trial progressed in fits and starts owing to logistics and challenges of conducting a trial with several accused persons. One accused would fall ill or be indisposed and trial would stall. The trial progressed until the state closed its case. The applicants and the co-accused applied for their discharge at the close of the state case. The application failed. They were dissatisfied with the dismissal of the application. They filed an application for review of the decision to dismiss their discharge application. That applications was argued before me on 22 January 2020. I reserved judgment and though judgment has delayed owing to a heavy workload and voluminous records to be received, the same should be available inside this first term.

The applicants have applied for bail pending the determination of the review application. In the case of applicant Robert Martin Gumbura, he attached the record of the magistrates court proceedings and a transcript of submissions in argument presented before me in the application for review. The application by applicant Blessing Makomborero Chiduke did not have a record attached to it. I should mention that Chiduke appeared before CHINAMORA J in bail court on 9 February, 2021. His record was referred to me because I already had heard a similar application

by Gumbura on 4 February, 2021 and had reserved judgment thereon. On receiving the record for Chiduke and noticing that his application was circumstantially similar to Gumbura's I resolved to deal with the application in chambers in terms of the Chief Justice's direction which allows for such a course. I was also comfortable to deal with the application on the papers without calling upon the applicant to appear before me because there are no factual matters in contention. The prayers sought by the applicants are in any event to be answered on a question of law,

The question to be answered is whether or not I have competent or valid applications before me. I must answer the question on whether or not it is permissible to grant bail pending the determination of the review application. The applicants' applications were instituted as a court application for review in terms of Order 33 rule 256 of the High Court Rules 1971. Rule 256 provides as follows:

> **"256. Review proceedings by notice of motion**
> Save where any law provided, proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial *quasi judicial* or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer as the case may be and to all interested parties.

Rule 256 derives from the general power of review which is reposed in the High Court by section 26 of the High Court Act, [*Chapter 7:06]* which provides as follows:

> **"26 Powers to review proceedings and decisions subject to this Act, and any other law**
> The High Court shall have power to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe."

Sections 27, 28 and 29 respectively provide for the grounds of review powers of the court upon a review of civil proceedings and last powers of the court on review of criminal proceedings

The observation which requires emphasis is that Part V of the High Court Act which provides for the High Court's power of review does not deal with nor refer to the liberty status of the applicant pending criminal review instituted by the accused person. It is trite that the institution of review proceedings does not suspend the proceedings whose reveiw is sought. Where a review of proceedings is sought in the course of the trial, the trial proceeds unless a stay of proceedings pending review is granted by the court. It is for the record noted that the continuation of the trial of the applicants and their co-accused stands stayed pending review.

In regard to whether or not it is open to the applicants in this case to apply for bail pending review, the starting point is therefore to acknowledge that the High Court Act in so far as it provides for powers, procedures and orders which can be made on review, does not provide that bail may be applied for pending review. If such an application may be made, then it would have to be by reference to some other statute or law.

Applicant Gumbura based his application on the provisions of s 123 (2) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. The reference to subs (2) of s 123 aforesaid is an obvious error because that subs simply provides that the provisions of s 117 and 117 A shall *mutatis mutandis* apply to applications made in terms of s 123. Section 123 (1) (a) and (b) is relevant to the determination I must make in regard to applicant Gumbura. The provisions thereof read-

> "Power to admit to bail pending appeal or review
> 1. Subject to this section, a person may be admitted to bail or have his bail conditions altered-
> a. In the case of a person who has been convicted and sentenced or sentenced by the High Court and who applies for bail
> i. Pending the determination by the Supreme Court of his appeal; or
> ii. Pending the determination of an application for leave to appeal or for an extension of time within which to apply for such leave;
> By a Judge of the Supreme or High Court;
> b. In the case of a person who has been convicted or sentenced by a magistrates court and who applies for bail-
> i. Where the record of a case is required or permitted, in terms of section 57 or 58 of the Magistrate Court Act [*Chapter 7:10*] to be transmitted for review; pending the determination of the review; or
> ii. Pending the determination by the High Court of his appeal: or
> iii. Pending the determination of an application for leave to appeal or for an extension of time within which to apply for such leave; by a Judge of the High Court or by any magistrate within whose area of jurisdiction he is in custody"

The provisions of s 123 therefore do not apply to an accused who is in the shoes of the two applicants who are not yet convicted and sentenced. The applicant Gumbura's application, to the extent that he bases it on the provisions of s 123 of the Criminal Procedure and Evidence Act is not provided for and therefore an incompetent application. It must be struck off the roll.

The applicant, Chiduke's application somewhat seats on a different footing. He has headed it an appeal against the denial of bail pending trial. The applicants' trial is not pending. It commenced. Bail pending trial is applied for by an accused whose trial is yet to commence. The proceedings of the applicants' trial are on review at the instance of the applicant and his co-

accused. The application by the applicant Chiduke which purports to be an appeal must be struck off the roll. It is noted that the provisions of 121 (1) (b) of the Criminal Procedure and Evidence Act provides that accused whose bail has been refused by a magistrate or Judge may at any time appeal to the High Court or Supreme Court Judge as the case may be against the refusal or in relation to any bail condition. Technically speaking the applicant herein can therefore note an appeal against the refusal by the magistrate to admit him to bail. However the appeal would have to be based on the record of proceedings as at the date of the decision appealed against. At that stage the applicant had not yet been tried. That position has been overtaken by events. Applicant can only now apply for bail in the course of trial. Different considerations will apply because the prospects of conviction or acquittal have to be considered. The applicants appeal is therefore academic.

There is yet another reason why the appeal or application of Chiduke is incompetent. It does not comply with rule 6 (1) (f) of the High Court Bail Rules 1991 which provides that

> "where the appeal is brought against the refusal by a magistrate to grant bail,"

the appeal should additionally provide details of

> "(i) The grounds on which it (bail) was refused if the grounds are known to the applicant and
> (ii) The date on which it was refused."

The applicant Chiduke did not provide a copy of the bail judgment appealed against nor the transcript. The appeal cannot be determined in the air. The appeal is therefore not in order. The applicant filed the appeal precipitately before putting his house in order. There is no valid appeal before the court for reasons I have alluded to and the purported application must be struck off the roll.

The two applications are therefore disposed as follows:

IT IS ORDERED THAT:

(a) Both applications case Nos. B 157/21 and B 136/21 are each struck off roll.

National Prosecuting Authority, respondents counsel