

KUDAKWASHE JONGWE  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MUSITHU J  
HARARE, 10, 13 and 20 December 2019, 15 January 2020 & 30 January 2020

### **Bail Pending Trial**

*N Chikono*, for the applicants  
*M Mutamangira*, for the respondent

MUSITHU J: On 18 November 2019, the applicant filed an application for bail pending trial as a self-actor. He faces one count of contravening s 126 (1) (a) of the Criminal Law (Codification and Reform) Act<sup>1</sup> (the Act), that is robbery. The application was placed before me on 10 December 2019, having been previously postponed by my sister NDEWERE J, and my brother DUBE-BANDA J to allow the respondent to file its response. On 6 December 2019, the applicant had filed a supplementary bail statement through his lawyers of record. The respondent had not filed a response to the supplementary bail statement when the application was placed before me. The applicant is jointly charged with two others, Tawanda Mukwecheni and Tinashe Tanaka Marimira. The application was postponed by consent to 13 December 2019 for argument. The respondent opposed bail. I must state at the outset that this matter is almost on all fours with that of Tawanda Marimira whom I granted bail under case number B1922/19.

In the course of his address to the court on 13 December 2019, Mr *Chikono* for the applicant informed the court that applicant's co-accused Kudakwashe Mukwecheni was admitted to bail on the same allegations by MUZOFA J on 2 September 2019. I requested Mukwecheni's file from the registry and indeed confirmed that he was granted bail under case number B1354/19. Ms *Mutamangira* for the respondent submitted that the respondent's position on the application had not changed, notwithstanding the granting of bail to his co-accused. At the conclusion of the addresses by counsel, the court saw it necessary for the investigating officer to be called to clarify

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<sup>1</sup> [Chapter 9:23]

certain aspects of the case and the circumstances under which the applicant and his accomplices were arrested. The investigating officer only availed himself on 21 January 2020, having been away on relief duty during the festive period.

The brief allegations against the applicant are as follows. On 14 August 2019, the applicant, Marimira, Mukwecheni and two others approached the complainant Tendai Mangwende at her Epworth residence around 1600 hours. They were in a Toyota vehicle with registration number ADK-0906. The applicant and Marimira were in handcuffs, while the other three identified themselves as police officers from the Zimbabwe Republic Police (ZRP), Harare Central Police Station. They demanded to search the complainant's house for stolen television sets which the complainant had allegedly received from the applicant and Marimira. The complainant denied them entry into her house, but the applicant and the other two unknown assailants produced a pistol and forced their way into the house, dragging along the complainant in the process. They searched the house and took away US\$1500.00. They drove off with the complainant and dropped her at the corner store in Epworth.

The complainant made a police report which led to the arrest of Mukwecheni. Acting on a tip off, the police managed to arrest the applicant and Marimira at Ruben Shops in Epworth where they were selling a television set. The complainant was invited to the police station and she positively identified the two. The applicant denied the allegations against him. He argued that he was being falsely implicated and referred the court to paragraphs 7, 8 and 9 of the charge sheet. For convenience, I quote the paragraphs referred to hereunder:

- “7. **Accused one and two** others who are unknown to the complainant identified themselves as police officers from ZRP Harare Central. They then demanded to search for stolen television sets which the complainant had received from Kudakwashe Jongwe and Tanaka Tinashe Marimira.
8. The complainant denied them entry into the house but the accused person produced a pistol as a way of instilling fear to the complainant”
9. **Accused person one and two** other unknown then dragged the complainant into the house and started searching. During the searches the accused persons took cash amounting to US\$1 500.00. They then dragged the complainant to their motor vehicle and drove off with her”

Accused one and two referred to in paras 7 and 9 are Mukwecheni and the applicant. The applicant did not elaborate on the relevance of these paragraphs to his application. In the supplementary bail statement, the applicant averred that he was arrested with Marimira at a bus stop in Chitungwiza while enroute to Epworth where they intended to sell a carpet they had in their

possession. The applicant and Marimira were known to the complainant as they had had prior dealings with her. They had sold her a television and hired Mukwecheni to transport it for them. Following their arrest in Chitungwiza, they were driven to Epworth by people whom they thought were police officers. They told the police that they had indeed sold a television to the complainant and hired Mukwecheni to transport it for them. The applicant and Marimira did not witness what happened in the complainant's house as they remained in the car. He did not see any firearm being used either. In short the applicant argues that he could not have committed the offence while under arrest. The applicant and Marimira were released by the police at Harare Central after their details were recorded. They were told that they would be called when required for further investigations.

In his supplementary bail statement, the applicant averred that he and the complainant knew each other well. They were in communication and the complainant had even sent him \$200.00 prior to his arrest. He denied having been convicted on charges of unlawful entry at Mbare Magistrates Court as alleged by the State. He was once arraigned at Mbare Magistrate Court under CRB MBR 5846/17, and admitted to bail. The bail receipt number is 00489. He was subsequently removed from remand. Nothing was attached to the application to confirm his admission to bail at Mbare Magistrates Court and his subsequent removal from remand. The charges he faced were not stated either.

The respondent opposed bail on the basis that the applicant was facing a serious offence and had been positively identified by the complainant. Further, the trial date had since been set as the matter was ripe for trial. Granting bail when the trial was imminent would only motivate the applicant to abscond in view of the seriousness of the charge. The matter was initially set to commence on 22 November 2019, but it was postponed to 5 December 2019, allegedly at the instance of the defence. Ms *Mutamangira* for the Respondent submitted that the matter was further postponed to 7 January 2020 and referred to the Regional Court for commencement of trial. The matter did not take off, and the applicants were further remanded to 6 February 2020. The docket has been referred back to the police for further examination. The charge was upgraded to armed robbery upon realizing that a firearm was used in the commission of the offence. Mr *Chikono* for the applicant denied that the defence was responsible for the failure of the trial to commence. He laid blame on the State which was not ready for the commencement of the trial.

Ms *Mutamangira* submitted that prior to the applicant's arrest in connection with this offence, he was on a warrant of arrest issued at Mbare Magistrates Court in some other matter. He had once been convicted at Mbare Magistrates Court on charges of unlawful entry in 2017. The investigating officer, Detective Constable Gideon Wakisai Muhonde told the court that on 14 August 2019, the complainant filed a police report claiming that some people who once sold her a television came to her house and robbed her of her money, while posing as police officers. Investigations led to the arrest of Mukwecheni, with Marimira and the applicant being arrested two months later. He opposed the admission of the applicant to bail. The applicant was likely to abscond as he once did in 2016 under CRB MBR6174/16, wherein he was facing four counts of unlawful entry. He was granted bail and he absconded, never to be seen again. His accomplice in that matter, Blessing Majuru who had been arrested earlier, was sentenced to 70 months in prison. The applicant had been arrested later, admitted to bail and absconded. The investigating officer admitted that the applicant was removed from remand in the matter under CRB MBR5846/17. He was however adamant that the applicant was on a warrant of arrest in the matter under CRB MBR6174/16. His absence from the station on relief duties during the festive period made it impossible for him to get the relevant supporting information to confirm his position.

It was not disputed by the applicant that he was indeed arraigned at Mbare Magistrates Court on four counts of unlawful entry and that he defaulted court and was on a warrant of arrest. It was also not disputed that his accomplice Blessing Majuru was convicted and sentenced to 70 months in prison on the same charges. In *S v Kondo and Another*<sup>2</sup>, CHITAPI J had the following to say regarding applications of this nature:

"I have already indicated that the applicants bear the onus to satisfy the court that it would be in the interests of justice to release them on bail. Although the onus reposed on them is to be measured on a balance of probabilities, it is not discharged by mere say so or bold statements. Section 117 (6) of the criminal procedure & evidence act requires that the applicants adduce evidence as to their suitability as worthy candidates for release on bail. the applicants have averred in their bail statement that the state "failed to prove compelling reasons justifying their continued detention" and to "put flesh to its reasons for opposing bail". On the contrary, the applicants are the ones who failed to put flesh to their petition for bail since the onus to satisfy the court that it is in the interests of justice in the circumstances to admit them to bail rested with them"

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<sup>2</sup> HH-99/17 at page 8 of the judgment.

The investigating officer has been intimately involved in the cases involving the applicant and I have no reason to disbelieve him when he expressed fears of abscondment on the part of this applicant. He did not suggest the same in the case of applicant's co-accused Marimira. He only got to know of Marimira in connection with this case, and had no problem in having him admitted to bail. With the applicant it was different. He had once been admitted to bail and defaulted. He is on a warrant of arrest on four counts of unlawful entry. Yes, he may have been removed from remand in another matter, but he has a pending warrant of arrest under CRB MBR6174/16.

In my view the applicant has failed to discharge the onus reposed on him to show that it is in the interests of justice to admit him to bail at this stage. He is a flight risk. The allegations that he is facing four counts of unlawful entry, had skipped bail on that charge and was on a warrant of arrest were not denied. The respondent made it clear in its response to the applicant's first application that this was one of the reasons for opposing bail. The respondent's submission in this regard was not refuted by the applicant. I am inclined to agree with the respondent's submission that it is not in the interests of justice to admit the applicant to bail at this stage.

The application is accordingly dismissed.

*Ngarava Moyo & Chikono*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners