

LAWYER MAPULA	1ST APPLICANT
AND	
WEDZERA MUGWAGWA	2ND APPLICANT
AND	
THABO MUTSHWEDI	3RD APPLICANT
AND	
JEFFREY MUITSI	4TH APPLICANT
AND	
MPHO NCUBE	5TH APPLICANT
AND	
THE STATE	RESPONDENT

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 23 NOVEMBER 2010 AND 25 NOVEMBER 2010

Mr Mashayamombe with Muzuzu for applicants
Ms N. Ndlovu for respondent

MATHONSI J: This is an application for bail pending trial. The five Applicants are being charged with kidnapping, assault and murder. The construction of these charges will obviously present the state with some difficulty in due course. However that is not the subject of the present application. The allegations are that on 8 October 2010 they took the four complainants from Dulibadzimu, Beitbridge accusing them of having stolen their 59 boxes of

Remington cigarettes. They directed the complainants to drive in their own vehicle to Mashakada Business Centre, Beitbridge and then to Makakavhule area. On the way, it is alleged that the Applicants were assaulting the complainants with stones and sticks.

It is alleged that the applicants were conducting their own investigations on their stolen cigarettes and they assaulted the complainants to force them to admit having stolen the cigarettes and to disclose where they had hidden them. They eventually got to a spot about a kilometre from Maroi, an illegal crossing point along the Limpompo river, the border between Zimbabwe and South Africa. When they failed to find the boxes of cigarettes they further assaulted the complainants. It is said the assault lasted about three hours before the Applicants placed the injured complainants on the banks of Limpompo river under guard. As the applicants stood sentinel over their victims they were arrested. The complainants were taken to Beitbrigde District Hospital for treatment.

The deceased, Kelvin Dube, had been badly injured as a result of the assault and eventually died on 19 October 2010 as a consequence thereof. The applicants were arraigned before a magistrate in Beitbridge and have now approached this court seeking their release on bail. They argue that they are good candidates for bail.

The state is opposed to the application on the basis that as the charges faced by the applicants are of a serious nature and there is a possibility of them being sentenced to lengthy imprisonment terms, this may be an obvious incentive for abscondment. *Ms Ndlovu* for the Respondent further submitted that in light of the fact that the 3rd, 4th and 5th applicants are

foreigners based in South Africa, they are unlikely to stand trial if granted bail and the same goes for the first and second Applicants who are of fluid aboard. She insisted that although the two gave Zimbabwean addresses, they also reside in South Africa.

The state has however not placed anything before me to substantiate the allegation that the first and second Applicants are based in South Africa and that they are not resident at their given Zimbabwean addresses.

The guiding principles for determination of bail application pending trial were set out in the case of *S v Jongwe* 2002 (2) ZLR 209(S) at 215 A-D.

The court must strike a balance between the liberty of the accused and the need to ensure that the person stands trial and does not interfere with the course of justice. The onus rests on the accused to show on a balance of probabilities why the interests of justice will be best served by his release on bail.

Regarding the risk of abscondment Chief Justice Chidyausiku stated at 215 C-D that the court should be guided by these factors;

- “(i) the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction;
- (ii) the apparent strength or weaknesses of the state case;
- (iii) the accused’s ability to reach another country and the absence of extradition facilities from the other countries;
- (iv) the accused’s behaviour;
- (v) the credibility of the accused’s own assurance of his intention and motivation to remain to stand trial.”

In their warned and cautioned statements all the Applicants admitted assaulting the complainants but all denied kidnapping them arguing that the complainants volunteered to

take them, in their own vehicle, to the place where they had hidden the cigarettes. The state has not alleged that when they drove their own vehicle to the various places they visited with the Applicants, the complainants were held at gunpoint or that some other undue influence was brought to bear upon them. I am mindful of the fact that the complainants numbered four when their alleged kidnappers were five. I do not think that on the issue of the kidnapping the state has a strong case.

But a life was lost as a direct result of the assault although it seems unlikely from the evidence that has so far been made available that the state will have an easy task proving murder.

It is the ability to reach another country and to escape from the jurisdiction of Zimbabwe which differs in respect of the individual applicants. This, coupled with the fact that in first Applicant's case his level of participation appears to have been minimal, necessitates the treatment of the Applicants differently. While the nature of the charge and the severity of the punishment is a relevant consideration, it cannot on its own be a ground for refusing bail *S v Ncube* 2002 (2) ZLR 524 at 528 E. It must be weighed together with other factors.

From the warned and cautioned statements of all the Applicants, especially that of fifth Applicant it is clear that not only did the first Applicant join the party long after the others had started assaulting the complainants, but also he and the second Applicant also withdrew and went away leaving the other Applicants with the complainants. It would appear that further assaults were perpetrated on them which turned out to be fatal. This supports the view that

the blameworthiness of first and second Applicants might be less than that of the other Applicants.

In addition, and decisively in my view, it is these two Applicants who are resident in Zimbabwe and therefore are more likely to stand trial if granted bail. I am not satisfied that the interests of justice will be best served by the release of the third, fourth and fifth Applicants who are clearly unlikely to stand trial. They are not entitled to bail.

In the result it is ordered as follows; that:-

1. The bail applications by the 3rd, 4th and 5th Applicants be and are hereby dismissed.
2. The 1st and 2nd Applicants be and are hereby admitted to bail on the following conditions:
 - (a) That they each deposit a sum of US\$1000-00 with the Assistant Registrar of the High Court in Bulawayo.
 - (b) That they each surrender their travel documents, if any, to the Assistant Registrar of the High Court in Bulawayo.
 - (c) That they report three times a week on Mondays, Wednesdays and Fridays between 0600 and 1800 hours at Beitbridge urban police station.
 - (d) That they reside, in respect of 1st Applicant, at No. 1001 Medium Density Suburb,

Beitbridge and, in respect of 2nd Applicant, at No. 2467 Dulibadzimu Township,
Beitbridge until the matter is finalised.

- (e) That they do not interfere with state witnesses.

*Masawi and partners, C/o Mashayamombe and company, applicants' legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners*