

KENNETH MUPAMBA
and
SIMBARASHE TINOZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 8 APRIL 2014

Bail application

R. J. Gumbo, for the applicants
I. Muchini, for the respondent

TAGU J: This is an appeal against refusal of bail pending appeal against conviction and sentence. The background of this matter is that the appellant was charged with and convicted of assault after a contested trial. He was jointly charged with one Simbarashe Tinoza. Both were sentenced to 14 months imprisonment of which 6 months imprisonment were suspended on the usual conditions of good behaviour. They noted their appeal against both conviction and sentence. They applied for bail pending appeal which was dismissed by the court *a quo*. They now appealed to this Honourable Court against refusal of bail.

The appeal was not opposed in respect of Simbarashe Tinoza but opposed in respect of this appellant Kenneth Mupamba. On 8 April 2014 bail was therefore granted in respect of Simbarashe Tinoza and I reserved ruling in respect of Kenneth Mupamba. This is now my ruling.

The appellant has argued that there are good and sufficient reasons for his success on appeal against both conviction and sentence which he advanced to the court.

Upon perusal of the record I entirely agreed with concession made by Mr *I. Muchini*. It became clear and undisputed that the evidence that was led in court against Simbarashe

Tinoza was insufficient to prove beyond reasonable doubt that he was present and committed the offence of assault against the complainant. It seems apparent that he was arrested because he owns a motor vehicle which is similar to the one used by the perpetrators of the assault and that the registration numbers appeared almost identical. The motor vehicle that was used by the people who committed the assault had registration numbers ACF 1835 whilst Simbarashe Tinoza's vehicle numbers were ACF 1838. Apart from the complainant none of the other witnesses positively identified Simbarashe Tinoza as having been present. For these and other apparent reasons there are prospects of success on appeal hence bail was granted.

However, as regards Kenneth Mupamba his circumstances from the evidence are quite different from those of Simbarashe Tinoza. I must however, hasten to point out that the court appreciates the need to treat alleged offenders the same way in situations where they are facing the same charges. But sight should not be lost of the fact that each individual's circumstances come under scrutiny when the court considers the right to individual liberty on one hand and the administration of justice on the other hand. Before I outline the circumstances of Kenneth Mupamba as revealed by the evidence, let me briefly outline the law relating to applications of this nature.

The main factors that are taken into account in such applications for bail pending appeal or refusal of bail pending appeal are:

- (a) The prospects of success on appeal, and
- (b) The interests of justice i.e. will the admission of applicants to bail not jeopardize the interests of justice through abscondment –*S v Hudson* 1999 (2) SACR 431; *S v Williams* 1980 ZLR 466 (AD); *S v Kilpin* 1978 ZLR 282 (A) and *S v Manyange* 2003 (1) ZLR 21 (H).

In the *Kilpin* case supra, the court pointed out that the principles governing the granting of bail after conviction were different to those governing the granting of bail before conviction. On the one hand, where the person has not yet been convicted he is still presumed innocent and the courts will lean in favour of granting him/her liberty before he/she is tried. On the other hand, where he/she has already been convicted the presumption of innocence falls away.

In casu, the applicant was convicted of assault and therefore the presumption of innocence no longer operates in his favour. In the *Williams* case supra, it was held that even after conviction the court should lean in favour of liberty if this would not endanger

the interests of the administration of justice. The prospects of success on appeal should be balanced against the interests of the administration of justice. The less the chance of success on appeal, the greater the chance there is of the convicted person absconding. Even if the court finds that indeed there are prospects of success on appeal against conviction, still that finding does not necessarily entitle the applicant to bail. It was pointed out in the *Williams* case, *supra*:

“But it was putting it too highly to say that bail should only be granted where there was a reasonable prospect of the appeal succeeding. On the one hand, in serious cases even where there was a reasonable prospect of success on appeal bail should sometimes be refused, notwithstanding that there is little danger of the convicted person absconding”. (Emphasis added)

In this case the evidence shows that Kenneth Mupamba was present at the scene of the offence. Not only that, although he said he only shouted at the complainant all the witnesses said he appeared drunk and he assaulted the complainant. Even defence witnesses incriminated him. This was a factual issue proved beyond doubt. During the trial it was found that this appellant participated in the assaults. Such a factual finding cannot easily be overturned by the appeal court –*Hughes v Graniteside Holdings (Pvt) Ltd* SC-13-84 and *S v Isolano* 1985 (1)ZLR 62 (SC) at 63C-G.

The applicant stand convicted of a needless assault perpetrated by a group of assailants, thus endangering the lives of passengers in the complainant’s vehicle. The court *a quo* properly discounted the imposition of community service. With an assault of this nature there will be a pronounced risk that the convicted person will flee from justice if released, especially if they have no reasonable prospects of success on appeal.

I am of the considered view that appellant’s chances of success on appeal against both conviction and sentence are indeed nil and as such he should be denied bail.

Accordingly, this application is dismissed.

Gumbo and Associates, Applicants’ legal practitioners
Criminal Division, Prosecutor- General’s Office, respondent’s legal practitioners