

ANNIE MADZIMA
and
LINAH MACHEKANYANGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 22 August 2017 & 30 August 2017

Bail Application

Mr Mukandagumbo, for the appellant
Mr Makoto, for the respondent

CHAREWA J: This is an appeal against refusal of bail by the magistrate's court.

Both appellants were arraigned before a magistrate sitting at Harare facing two counts of fraud as defined in s136 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] and were denied bail pending trial. Dissatisfied with that decision, they now appeal to this court.

It is alleged that in June 2017, the appellants connived, together with one Tendai Nyambuya who is still at large, to defraud potential home seekers. Consequently, in count 1, the appellants, using the forged national identity document of one Mirriam Chikwanda who is resident in South Africa, placed an advertisement in the Sunday Mail of 25 June 2017, purporting to so be selling 3813 Nhoru Road, Windsor Park, Ruwa, which belongs to Mirriam Chikwanda.

Complainant respondent to the advertisement and after a telephone exchange with Tendai Nyambuya, on mobile number 0736561258, who claimed to be the husband of the owner, met 1st appellant who claimed to be the owner of the stand and 2nd appellants who was allegedly her niece at Jameson Hotel on 2 July 2017. The two appellants proceeded to show complainant the property and agreed a purchase price of \$19 000. On 3 July, they signed an agreement of sale whereupon complainant made a mobile transfer of \$10 000 into 1st accused's account number 1006474108 at Steward Bank with the balance being payable on 31 July 2017.

The offence came to light when complainant started developing the stand and was informed by Mirriam Chikwanda's son-in-law Ronald Hillman, that the property was not for sale, leading to the appellants' arrest. Complainant's deposit has not been recovered.

In the second count, the two accused, using the same *modus operandi* and after sending a copy of Mirriam Chikwanda's identification card and Title Deed via whatsapp, offered to sell the same piece of land to Clifford Nhekairo for \$19 000. On checking with the Deeds Office, complainant became suspicious when he noticed anomalies on the spelling of "Mirriam" with one r rather than two. He therefore searched for the relatives of Mirriam Chikwanda and discovered that she was in fact in South Africa and was not selling her property. Complainant therefore made a report leading to the arrest of the appellants.

The police, on the form CR 242, opposed bail on the grounds that

- a. The appellants were facing serious charges for which, upon conviction, they were likely to receive long imprisonment terms which may influence them from absconding trial.
- b. Their accomplice, Tendai Nyambuya is still at large and upon release they may reunite with him and commit further crimes.
- c. The appellants are so daring that despite having defrauded the first complainant they continued to pester second complainant to fall into the same trap.
- d. They were actually arrested on their way to collect the balance from first complainant.
- e. Their correct addresses have not yet been established.

In her ruling, the magistrate took into account the seriousness of the charges the appellants face and counterbalanced this with the Constitutional requirements to the right to liberty. She then considered the fact that the third accused is still at large as a counterweight against the release of the appellants. She also considered the fact that the one appellant has a previous conviction as a mark of predisposition to commit further crimes and concluded that the State was probably correct that if released on bail the appellants were likely to abscond.

In their appeal, the appellants contend that the record shows they do have an address in Chiredzi which is known by some of the police details. They totally deny involvement in the commission of the crime on the grounds that the mobile number used in the commission of the offence or the bank account into which the proceeds of the sale were deposited are not in their names. Further, they submitted that the magistrate ought to have called for CCTV footage to

see who actually transacted on the account, or found other evidence as to who actually owned the mobile number used in the commission of the crime.

It seems to me that appellants counsel was misguided. It is not for a judicial officer dealing with bail applications to go into the details of the evidence that proves who actually committed the offence, as that is an issue for the trial. That the mobile number used in the commission of the offence is not registered in appellants' names is actually the basis for the allegation of fraud: that appellants used other people's forged identity documents and mobile numbers to defraud innocent third parties. Appellants ought then to have explained why they were found in possession of Mirriam Chikwanda's identification, or why they were communicating on a mobile number registered to someone else for purposes of their bail application. I note that nowhere in the application is this addressed, even during the bail hearing when I drew this to the appellants' counsel's attention. All they did was to make a bare denial of being found with anything.

Frankly, I cannot fault the magistrate's decision to deny bail to an extent that I would overturn it. The magistrate did not err or misdirect himself in considering that the offence the appellants are charged with is serious and if convicted, they may expect to be imprisoned for a long time. In addition, the magistrate took account of the fact that the one appellant does have previous relevant convictions which points to predisposition to commit crime. Forged documents were used to operate bank accounts, mobile numbers and to steal the identification of innocent third parties, which were likely to lead them to loss of property.

As matters stand, the first complainant lost a considerable amount of money which has not been recovered. The magistrate was in my view correct that it would be unwise, in the circumstances of the case to give the appellants the benefit of doubt, which may lead to either abscondment by the appellants, or the further commission of more crimes against the unsuspecting public, more so in the circumstances of this case where the apparent brains behind the scam remains unaccounted for.

The balance in my view, between the interests of justice, the interests of the public and the interest of the appellants' freedom is tilted more in favour of the due protection of the public, particularly since chances are that more public resources may be required to secure the attendance of the appellants for trial should they abscond. This is also a case where justice must seen to be done, where a complainant who clearly knows the persons who defrauded him must

trust that the justice system will do what is right to protect him or anyone else from a similar plight. I therefore agree that it would send a wrong message to release the appellants on bail.

Accordingly, the appeal against refusal of bail is dismissed.

Chigoro Law Chambers, applicant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners