

**CM**

**VERSUS**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 23 JUNE 2008 AND 17 JULY 2008

*Mr. T. Masiye-Moyo* for the applicant  
*Mr. W. Mabaudhi* for the respondent

Bail pending appeal

**CHEDA J:** This is an application for bail pending appeal.

On the 7<sup>th</sup> day of January 2008, appellant appeared before the magistrate court sitting at Plumtree where she was charged with contravening section 157(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] in that she was found in possession of 0.705kgs of dagga. She pleaded guilty, was convicted and sentenced to 20 months imprisonment.

She is 41 years of age and is a widow.

She applies for bail and the main reasons for the said application is that she is a widow and that she is HIV positive and therefore is ill. In support of her illness, *Mr. Moyo-Masiye* submitted a letter from Dr. Ferguson and Partners dated the 19<sup>th</sup> day of February 2008. The contents of the letter read;

“19 February 2008

Dear Mr Masiye-Moyo

**RE: CM**

This note serves to certify that the above attended my surgery on 01/10/2007. Her history was that she had been coughing and losing weight for about two months prior to the visit. She lost her husband in 2001 and is looking after seven children. On examination she was ill-looking, wasted and had lymph nodes in both axilla. I recommended that she does an H.I.V. test that came out positive. She was commenced

on antibiotics and TB investigations were initiated. On her last visit on 16/10/2007, her results for the TB investigations were not ready and she was asked to check them the following week. I did not see her after that visit.

Thank you,

(Signed)  
DR J MOYO  
M B C HB.”

In her application she attacks the trial court for not seriously taking into account that she is HIV positive and that she is a widow who is fending for two minor children.

I propose to deal with the points raised in this application and others which were not.

1. **HIV status**

Firstly the letter dated 19 February 2008 was not made available during the trial but only became available when this application was being made. It is clear therefore that this letter was solicited by her legal practitioner as she was already in prison. The letter, however, does not take the matter very far as the doctor only confirmed her HIV status but did not state whether or not she was bedridden or unable to work.

The court, takes judicial notice that HIV, scary as it is, is now medically better managed due to the advancement in medical development in society. It is now trite in the medical and health circles that an HIV patient can now actively participate in his/her health care decisions provided that amongst other methods gets proper immunization and medical treatment to prevent certain opportunistic infections or illnesses and joins a support group, amongst other therapies.

Once a person is properly managed his or her life can actually be prolonged. Therefore the fact that she is HIV positive is not per se a good reason for her to be granted bail.

While this factor is no doubt important, that alone without more is not enough. This factor should be combined with other factors which are mitigatory.

**Widow**

While it is a fact that she is a widow, this has been her status since 2001 when she lost her husband. From that time her status changed and she has always been looking after herself and the children. While the court sympathizes with her plight, this is how far it can go. The court is not concerned with sympathies but facts and the law. Since

applicant has always been aware of her marital status, she is expected to live with the knowledge that her life has changed and should therefore always conduct her life with this fact in mind. She cannot transgress the law and expect sympathy. The fact that she is able to carry out her daily chores is ample evidence that she can still lead her life positively.

In addition, thereto, she has a recent and relevant previous conviction which cannot be ignored in determining this application. This is a factor that militates against her.

In view of the above I doubt if a different court will substitute the sentence passed by the court *a quo*. There is therefore no need to release a person who would be sent back to prison again.

Repeat offenders should always bear in mind the old Japanese proverb which says “Forgiving the unrepentant is like making pictures on water.”

Accordingly this application is dismissed.

*Hwalima, Moyo and Associates* appellant’s legal practitioner  
*Attorney General’s Office* respondent’s legal practitioner