

KELVIN MARARAHANDA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MUZOFA J  
CHINHOYI. 28<sup>th</sup> day of April, 2022

*Applicant* in person  
*TH Maromo* for the Respondent

### **Bail pending appeal**

**MUZOFA J:** This is an application for bail pending appeal. The applicant was convicted in November 2017 on one count of stock theft in contravention of s114 2(a)(i) of the Criminal Law (Codification and Reform Act) Chapter 9:23. The court did not find any special circumstances, it then imposed the mandatory sentence of 9 years imprisonment.

The applicant filed an appeal against conviction in 2022 after being granted leave by this court to do so under HC7/22.

Before addressing the merits of this case I wish to relate to the unfortunate circumstances of this case. When the applicant appeared before the court he was bedridden, he was carried into court by two inmates. He cannot walk. It has since been confirmed by Dr G. Gomera of Chinhoyi Provincial Hospital that he suffered a spinal cord injury in 2018 resulting in him being paraplegic.

I inquired what happened to the applicant. The explanation was that the applicant was assaulted by the police. I ordered the State to follow up the issue. The paper trail shows that when the applicant was convicted he was not a paraplegic. He was at Chinhoyi Prisons. He was requested from prison by Detective Constable Nomathemba Ndlovu for interviews on a robbery case under DR23/12/16. On the 2<sup>nd</sup> of January 2018 Prisons released him upon request.

On 11 January 2018 a letter was written to the Officer in Charge CID Chinhoyi advising as follows :

*“2. We wish to inform you that officers from your office took out of prison the above named prisoner for interviews on a robbery charge on Form 86. The team which was lead (sic) by Detective Constable N. Ndlovu assaulted the prisoner and he was admitted at Chinhoyi Provincial Hospital as from the 4<sup>th</sup> of January 2018 to the 10<sup>th</sup> of January 2018. The prisoner is seriously ill and in need of medical attention.*

*3. Submitted for your attention.”*

Since 2018 nothing has come out of the complaint. When the State followed up the issue on the Court’s directives no cogent response was given.

What is very clear is that the applicant’s disability resulted from assaults by the police. This is a matter that the Officer in Charge must have investigated and brought to book the responsible officers. Such high handedness by law enforcement agents must not be condoned. The applicant’s condition resulted from the assaults by the police. What is disheartening is that nothing was done about it. I hope that, by highlighting this issue in this judgment the Officer In Charge CID Chinhoyi will seriously consider this issue.

That as it maybe the court has to deal with this application on the merits.

In an application for bail pending appeal, the applicant bears the onus to show on a balance of probabilities that he is a proper candidate to be granted bail as provided in s115 (c) (2) (b) of the Criminal Procedure and Evidence Act. This is so because, after conviction and sentence the presumption of innocence provided in s70 of the Constitution is no longer applicable to the applicant. He is no longer presumed innocent since he has been convicted. His admission to bail is no longer a right as provided in s50 (i) d of the Constitution. The applicant’s right to admission no longer arises from the Constitution but from the limited instances provided in s123 (i) (b) (ii) of the Criminal Procedure and Evidence Act see *Majani & Another v The State* HH642/17

It is now trite that the court has to make certain considerations in order to come to an appropriate decision. These include the prospects of success, the proper administration of justice balanced with the applicant's liberty. The prospects of success are a highly determinant factor. This is so because where there are no prospects of success bail must not be granted. At the end the Court must balance the liberty of the individual and the proper administration of justice.

I now turn to consider the applicant's grounds of appeal to determine the prospects of success.

The grounds of appeal are set out as follows;

1. The Magistrate grossly erred on a point of law by failing to advise the appellant of his right to legal representation in terms of Section 191 and 163 (A) of the Criminal Procedure and Evidence Act (Chapter 9:07) as read with Section 70 (i) (f) of the Constitution of Zimbabwe (And 20) (2013) act rendering the trial to be unfair.
2. The Magistrate erred by failing to assist the applicant in conducting a meaningful cross examination to the State witness.
3. The Magistrate erred by failing to apply caution on the evidence of identification by one State witness which is weak.
4. The Magistrate erred when she based the conviction that the applicant failed to challenge the State witness Ellen Chokumarara about an alleged red cap which cap applicant did not know as he had never been to Ellen Chokumarara's place of residence.
5. The trial Magistrate committed a gross error of misdirection in establishing the guilt of the applicant on ground that he did not bother to raise a defence of *alibi*.
6. The Magistrate erred to buttress the conviction by the failure of 1<sup>st</sup> accused to cross-examine the State witness and was attributed on the applicant.

Although six grounds of appeal are set out they raise procedural issues and one issue on the merits, that is the identification of the applicant.

The first and second grounds of appeal raise procedural issues relating to the conduct of the trial proceedings. The applicant impugns the court in that it did not advise him of his right to legal representation in terms of s163A and s191 of the Act. It is trite that an appeal procedure and a review procedure are different. The relief is also substantially different depending on the circumstances of the case. An appeal impugns the merits of the case and where it is substantiated the conviction is set aside. A review deals with the procedural aspects of the proceedings. Where the application is successful the matter maybe referred back to the court a quo for redress of the procedural irregularity. It is only in limited circumstances that the proceedings may be set aside on review. Generally where grounds for review are placed before a court on appeal they would be improperly before the court. This is the case in this matter the grounds of appeal are improperly before the Court.

The third and fourth grounds of appeal deal with the identification of the applicant. According to the applicant the key state witness Ellen Chokumarara ‘Ellen’ did not positively identify him as she contradicted herself. In her evidence in chief she said the applicant and his co accused approached her and asked for water to drink. When she went to fetch the water, upon return the applicant had left. Under cross examination she said the applicant was served with water. Having contradicted herself on this aspect Ellen’s evidence on identification must not have been accepted by the court. In my view that does not detract from the positive identification by Ellen. It is not in dispute that Ellen spoke to the applicant when he arrived at her homestead in the company of his co-accused. It was around 20 00hours. She had a bright light. So she could clearly see the applicant. The applicant was described as short and that he big nose. He was putting on a red Nike cap. The applicant did not deny this description. Ellen insisted that she had an interest in identifying these strangers because an alert had been sent about stolen beasts.

The trial court did not rely on Ellen’s evidence only on the applicant’s identification. It also accepted Barnabas Mashanda’s evidence. Barnabas said they apprehended Tawanda Gwaze who was in the company of the applicant. Tawanda was calling out Kelvin. It is not in dispute that Tawanda was in the company of a person known as Kelvin. When they asked Tawanda which Kelvin he was calling out to, he indicated that he was calling Kelvin Mararahanda the applicant in this case. This evidence was not denied by the applicant. Chrispen Harare another

villager corroborated Barnabas's evidence on this aspect. The court also relied on the evidence of the investigating officer, that the applicant was arrested at court on the day Tawanda was appearing for remand.

In my view the court a quo properly addressed its mind on the issue of identification of the applicant. It also warned itself of the dangers of visual identification where persons are unknown to each other. The grounds of appeal cannot succeed.

The fifth ground of appeal is meaningless. A reading of the record of proceedings shows that, when the court referred to the alibi, it did not consider that as a decisive issue. It was just reasoning that even if the applicant denied being at the scene there was no evidence that he was somewhere. This was just an *obiter dictum* that did not form the rationale for the decision. This ground of appeal has no prospects of success.

The sixth ground of appeal, that the court buttressed the conviction on the failure by the first accused to cross-examine the State witness suffers the same fate as the other grounds of appeal. As a starting point, the court did not attribute the failure by the applicant's co accused person to cross examine the witness to the applicant. The court referred to the applicant's failure to cross examine the witnesses. It is trite that, that which is not denied is taken as admitted. In this case the applicant did not dispute certain key averments by witnesses like Ellen and Barnabas as already mentioned. The court was within its rights to accept that evidence as the truth of what transpired since the applicant did not deny it by way of cross examination.

In the whole, there appears to be no prospects of success on appeal.

Accordingly the application for bail pending appeal be and is hereby dismissed.

The Registrar is directed to serve this judgment to the Officer in Charge CID Chinhoyi to address the issues raised in this judgment.

*National Prosecuting Authority for the Respondent's Legal Practitioners*

