THE ATTORNEY GENERAL
versus
AMINATA BOMBO
and
TSHIBASU MUKUBA
and
BILOLO TSHELA
and
TSHELA MUKUBA
and
KABWE KONGOLO
and
TSHIVUANDI KAFUNDA
and
BLAISE MUKENGE
and
MAVIS MUKENGE.

High Court of Zimbabwe
Bhunu J.
Harare 20th April 2009 and 21st April 2009.

Bail Appeal

Mr. Masamba, for the Appellant.
Mr. Kwenda, for the Respondent.

BHUNU J: On the 1st of April 2009 the 8 respondents appeared before the Magistrate sitting at Harare charged with defeating or obstructing the course of justice as defined in section 184 (1) (e) of the Criminal Law (Codification And Reform) Act [Chapter (9 : 23].

All the accused persons are Congolese refugees. They are alleged to have interfered with a witness who had reported a case of child abuse against a fellow refugee who has since been arrested under CR Hatfield 105/2/09. While investigations were still in progress the accused allegedly teamed up and approached the witness at her residence where they threatened her with unspecified action should she persist to implicate their friend. Owing to the alleged threats the witness is said to be living in fear and is now uncooperative with the police.

On those facts the state opposed bail on the basis that the accused are of no fixed abode. It was submitted that the accused had given their friends' addresses as their own

residential addresses. It was further argued that the accused were likely to interfere with investigations as the minor's parents or guardian were unknown.

The respondents in unison vouched that they will not interfere with investigations. Thereafter the record reads as follows:

By Court

Q. Where do you reside?
R.
A A1 – 38 Desmond Rd

A2 – 3. 56 Airport Rd Hatfield.

A4 & A 5 Tongogara Refugee Camp.

A6 – 54 St Andrews Hatfield.

A7 & 8 – 3 Logan Crescent Hatfield.

Ruling

The reasons advanced by the state were not substantiated in any way. Therefore all accused in the Court's view are suitable candidates for bail. Bail is therefore granted (See cover for conditions.).

1. To deposit USD10 bail each.
2. To reside at their given addresses.
3. Not to interfere with witnesses.
4. To surrender travel documents.
5. To report once a week on Friday between 6 am and 6 pm at Hatfield police station"

The state has now appealed against the magistrate's decision on the grounds that:

1. respondents are likely to interfere with witnesses.
2. Respondents are facing serious allegations and are likely to abscond and
3. They are of no fixed aboard.

In elaboration of the state's appeal Mr. Masamba argued that the Magistrate had dealt with the application in the most perfunctory manner without carrying out a proper enquiry to enable him to make a just and informed decision.

At the appeal hearing there was a suggestion that the respondents may have deserted from Tongogara Refugee Camp in Chipinge. There was also a suggestion from counsel for the respondents that the complainant has now been placed in a place of safety such that it is now highly unlikely that the respondents can interfere with her. An examination of the record of proceedings shows that when giving their particulars to the police 4th and 5th respondents indicated that they resided at number 56 Airport Road Hatfield whereas in Court they told the presiding magistrate that they resided at Tongogara Refugee camp.

The 1st respondent gave his residential address as 38 Desmond Rd without specifying the location in which that number is located yet the presiding magistrate failed to notice that such an address could not be located.

At the appeal hearing we were told without any contradiction that all the respondents are recognised refugees based at Tongogara camp. They are required to fill in a log book each time they leave the camp. It appears therefore that their movements in and out of Tongogara Refugee Camp are regulated. Section 12 (2) of the Refugees Act [Chapter 4:03] empowers the responsible minister to regulate and designate places where refugees may stay. It provides that:

> "(2) The Minister may, by notice published in the *Gazette*, designate places and areas in Zimbabwe within which all—
>
> (*a*) recognized refugees and protected persons; and
>
> (*b*) persons who have applied in terms of section seven for recognition as refugees; and
>
> (*c*) members of the families of persons referred to in paragraph (*b*);
>
> or any classes thereof, as may be specified in the notice, shall live."

As things stand we do not know whether the respondent lawfully left Tongogara Camp and whether they can lawfully reside at the addresses given outside Tongogara Refugee Camp.

It appears to me that indeed the presiding magistrate does not appear to have put much thought into his work before making the order. If fourth and fifth respondents are indeed resident at Tongogara Refugee Camp in Chipinge it boggles the mind why they were made to report at Hatfield police station weekly. With the current economic hardships can it honestly be said that they will be able to meet that bail condition without any difficult. The sincerity of the respondents in opting to report at Hatfield police station from Chipinge is questionable.

Magistrates need to be reminded of the onerous duty cast upon them in applications of this nature particularly where the accused are unrepresented as was the case in this matter. The words of *Reynolds J* in the case of *Attorney General v Phiri 1987 (2) ZLR 33 (HC) at 35 C.* are worth recounting. In that case the learned Judge had occasion to remark that:

> "The fundamental principle governing the Court's approach to applications for bail is that of upholding the interests of justice. This requires the Court, as expeditiously as possible, to fulfill its function of safeguarding the liberty of the individual, while at the same time protecting the administration of justice and the reasonable requirements of the state."

In this case it can hardly be said that the ends of justice to ensure that the respondents would not abscond were catered for. As I have demonstrated above there are too many gapping holes which the Court could have filled in by making simple enquiries. The respondents being foreign refugees, the court ought to have at least verified the respondent's residential addresses before granting them bail. This was important in the face of the state's submission that the respondents were of no fixed abode.

It is trite that the onus in a bail application rests with the applicant to prove on a balance of probabilities that he is a good candidate for bail. In this case, the onus rested with the respondents but they were severely handicapped in that they were in captivity in a foreign land without legal representation. Granting the applicants bail in the absence of vital information was not doing them a favour because it rendered them vulnerable on appeal.

This again brings me to the need to remind magistrates of their duty to the unrepresented accused person. Judicial work is a painstaking job which calls for unwavering dedication to duty. Taking the easy way out as happened in this case is often not the answer. Such a disposition can easily compromise the ends of justice either way. Seeing that the accused were in custody and without legal representation it was incumbent upon the Court to call for the verification of the respondents' given residential addresses.

It is therefore not surprising that both counsel are agreed that the presiding Magistrate appear to have hastily made his determination without the full facts having been placed before him. For instance we do not know whether or not the respondents can lawfully reside at their given addresses outside the designated refugee camp. We do not know whether the respondents deserted Tongogara Refugee Camp. These facts can easily be verified from the

camp administrators or the High Commissioner for refugees so we were told at this appeal hearing.

According to the dictum in *R v Heerworth 1928 AD 265* a judicial officer must not only ensure that justice is done but that it is seen to be done In this case it cannot be said that justice was done and seen to be done when the presiding officer took the easy way out and granted bail in the absence of vital information which was readily available by way of a simple enquiry.

As a result of the magistrate's failure to make the necessary enquires we do not know whether the abused child is now in a safe place such that it can no longer be interfered with. We do not know whether the residents at the given addresses outside Tongogara Refugee camp are willing to accommodate the respondents..

We do not know the whereabouts of the witness allegedly intimidated by the respondents and what safeguards if any, can be put in place to ensure that her own safety and the ends of justice are not compromised.

For the fore going reasons and more, both counsel are agreed that the ends of justice can only be met by quashing the proceedings in the Magistrates Court to facilitate a proper enquiry before a fair and just decision can be made. I believe this can be done by the court invoking its review powers It is accordingly ordered:

1. That the proceedings in the Magistrates Court sitting at Harare on the 1st April 2009 be and are hereby quashed and set aside.
2. That the matter be and is hereby remitted to the Magistrates Court for a fresh hearing and determination.

Attorney General's Office, the Appellant's Legal Practitioners

Chinamasa Mudimu Chinogwenya & Dondo, the Respondent' Legal Practitioners.