CHARLES KATEWERA
and
PARTSON MUNAKU JONGWE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 6 March 2013

P Chiutsi, for the applicants
A Masama, for the respondent

BAIL APPLICATION

MWAYERA J: The applicants were convicted of theft of Trust property as defined in s 113 (2) (d) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] as read with s 277 (3) of the code. After a protracted trial in the Regional magistrate court they were duly convicted and sentenced for the offence. During trial there were 3 accused that is including the company in which the two applicants are directors. Upon sentencing the first accused that is the company for the obvious reason that it is a legal persona was sentenced to pay a fine or in default a writ of execution against company property. In other words the two applicants and the company were the treated differently for purposes of sentence.

The two applicants irked by the conviction and sentence approached this court for bail pending appeal. I must hasten to point out at this stage that the two applicants initially made an application for bail pending appeal before the trial magistrate. This application was mounted prior to filing of notice of appeal and the trial magistrate correctly threw out the application for it would have amounted to bail pending nothing which would be improper. It is common knowledge that for one to make an application for bail pending appeal there should be a notice of appeal and grounds of appeal filed. The applicant counsel launched an unwarranted attack on the trial court for not entertaining such an unprocedural application

I will now turn to the merits of the application for bail pending appeal argued before this court. After hearing arguments for and against the granting of bail I dismissed the application for bail. In coming up with that decision the court gave due regard to the settled principals governing bail pending appeal and the circumstances of the applicants and also the

proceedings and findings in the trial court. In applications of this nature the court has to consider the following factors;

1. Whether or not there are prosecutors of success on appeal
2. The likelihood or other wise of abscondment.
3. The likely length of delay before the appeal is heard
4. Any other factors which the court deems necessary in assessing the suitability of the applicant for bail pending appeal. Upon convicting the first accused a company which is not part of these proceedings was sentenced to pay a fine of $15 000 or in default of payment a writ of execution against company property in addition accused was sentenced to pay the complainant $42 154-39 through the clerk of court Harare.

The two applicants were sentence each to 7 years imprisonment of which 2 years imprisonment were suspended for 5 years on usual conditions of good behaviour. Further 3 years were suspended on condition each applicant pays $42 154,39 restitution to the complainant through the clerk of court Harare leaving an effective sentence of 2 years imprisonment.

The total amount involved in the offence was $126 463-17. From the record of proceeding of the trial court it is apparent that the applicants and the complainant transacted and that the outstanding amount which form the subject of the offence was not remitted to the complainant. The trial court in its judgment properly and carefully assessed the evidence adduced before it and come up with a conviction well grounded on the evidence. Most aspects of the case where common knowledge and not disputed. The applicants did not dispute being given the money by the complainant. The only issue the court had to decide on is whether the applicant unlawful abused the trust bestowed on them and stole the complainant's money. It is apparent from the record of proceedings that the complainant did not raise any cry or alarm on the amount the she authorised the applicants to use but the issue she complained of pertained to the money the applicants used without any authorisation. It was clear in the uncontroverted evidence on record that she did not give a blanket authorisation for use all the money but the complainant wrote correspondence where she authorised and sanctioned use of money. There is nothing which was before the trial court showing she had authorised first applicant and the second applicant to use the $126 463-17.

The record of proceeding does not show that the applicants dispute unlawfully using the complainant's money for their won benefit. The essential elements of theft of trust funds

were fulfilled by the evidence before the trial court and it was on that basis the trial court came up with a conviction well founded on evidence placed before it.

In the wake of evidence showing that indeed the applicants were entrusted with money by the complainant and that without authorisation they used part of that money then the conviction by the trial court is well pinned on evidence adduced. The fact that the applicants and complainant are related and had earlier transacted and agreed on other sums of money does not give a blanket authorisation for use of money. Given the circumstances of the case before the trial court there is really no basis for another court interfering with the trial court's decision of conviction, put in other words there are no prospects of success an appeal against conviction in the face for the overwhelming and clear evidence of theft of money bestowed for keeping. Turning to the sentence imposed it is clear the first accused being a company got a different sentence from the applicants and one can not say the trial magistrate improperly exercised his sentencing discretion. The sentence imposed of 7 years with 2 years suspended on conditions of good behaviour and 3 years on conditions of restitution for theft of trust property money to the tune of $126 463-73 can not be said to be outrageous. If anything the trial court properly exercised its sentencing discretion weighing and matching the offence, the offender and societal interest.

There is no likelihood of interference with the sentence as such no prospects of success on appeal against sentence. Having said there are no prospects of success against both conviction and sentence the likelihood of applicants not availing themselves for prosecution of the appeal are high. The conviction and sentence can induce them into absconding and that will then put the interest of justice into jeopardy, I am alive to the likely delay in prosecution of appeals but given that there are no prospects of success on appeal that factor of likely delay can not stand alone. The applicants have been convicted and sentenced and as such have to prove their entitlement to bail. In this case the circumstances are such that the interest of justice and integrity of the system will be prejudiced by admission of the applicants to bail in the absence of any prospects of success on appeal against such conviction and sentence.

It is against this back ground that the applicants' application was dismissed.

Puwayi Chiutsi legal practitioners, applicant's legal practitioners
Attoney General's Office, respondent's legal practitioners