

RICHARD KOSAMU  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
NDEWERE J  
HARARE, 25 September, 2020 and 16 December 2020

**Bail pending appeal:**

*R.C. Muchenje* – for applicant  
*Ms F. Kachidza* – for respondent

NDEWERE J: On 21 October, 2019 at around 17:30 hours, the applicant was driving a public service vehicle, a Toyota Hiace registration number ABJ 4962 along Simon Mazorodze road, on the outer lane of the road. When he reached Mbare Police District Headquarters, the accused person knocked down the deceased, a 6 year old boy who was crossing the road from west to east. The deceased died soon after the impact. The State charged the applicant with culpable homicide and alleged that the applicant was negligent in one or more of the following particulars of negligence;

- (a) Failure to exercise a high degree of care called for from a driver who sees children on the road or in front of him.
- (b) Failure to stop or act reasonably when an accident seemed imminent.

The applicant pleaded guilty to the charge of culpable homicide and he was duly convicted.

He was sentenced to 36 months' imprisonment of which 12 months were suspended for 5 years on condition the accused did not within that period commit any offence for which negligence was an element to which he will be sentenced without the option of a fine.

The applicant noted an appeal against sentence only on 31 August, 2020.

On 15 September, 2020, the applicant applied for bail pending appeal:

The State opposed his application for bail pending appeal on 22 September, 2020.

The matter was argued before me on 25 September, 2020. I noted that in their submissions, none of the parties had referred to the Road Traffic accident sentences and I requested that they each provide case law that pertains to sentences for culpable homicide arising from road traffic accidents. By the time of writing this ruling, none of the parties had provided the requested case law.

In my research on appropriate sentences, I noted the case of *Manhenga v The State*, 2014 (2) ZLR 705.

This was an appeal to the High Court against a custodial sentence imposed in a road traffic accident where the appellant knocked down a motor cyclist. On appeal, the appellant's sentence was reduced to a fine of \$1 000.00.

In *S v DURU* 1989 (3) ZLR 111 (S/C), a motorist who killed a 5 year old boy who was herding goats was fined \$400 or four months imprisonment. He was prohibited from driving for six months and his license got cancelled.

From the above sentences, it appears that a sentence of 36 months, with 12 months suspended is too excessive in the current circumstances.

Even the case of *Emmanuel Korovedzai vs The State*. HH 178/15 relied on by the state where a commuter omnibus driver was sentenced to 6 months, 2 months suspended for 5 years shows that the current sentence of 36 months, with 12 months, suspended is too excessive.

In my view, the applicant has an arguable case on appeal against sentence. As correctly pointed out by the Court in *S v Hudson* 1996 (1) SACR 431 (W),

“If the appeal is reasonably arguable and not manifestly doomed to fail, the lack of merit in the appeal should not be a cause for refusal of bail. The question is not whether the appeal “will succeed” but on a lesser standard, whether the appeal is free from predictable failure to avoid imprisonment.”

See also *David Edward Gardner v The State* HH 60/08 where MAKARAU JP, as she then was said it would be a sad day for justice if the appellant were to be sentenced differently on appeal but after he had served the whole or a large portion of the prison term because he was denied bail pending appeal.

Since the applicant has an arguable case on appeal, bail pending appeal should be granted in terms of the draft order. It is ordered that;

1. The applicant be and is hereby granted bail pending appeal.

2. The applicant shall deposit ZWL \$2000.00 to the Clerk of Court, Mbare Magistrates Court, as bail deposit.
3. The applicant shall continue to stay at no. 17791 Stoneridge Park, Waterfalls, Harare, until his appeal is finalised.
4. The applicant shall report once a week on Fridays at Waterfalls Police Station, between 6am and 6pm till the appeal is finalised.

*Mbidzo Muchadehama and Makoni*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners