

BRIDGET MUZADZI
and
GREYSTONE RUFARO CHIHORO
and
EDWIN RUSIKE
and
RITA KAMERA
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE; 1 November 2023

Application for Bail Pending Appeal

N Tsarwe, for the applicants
R Chikosha, for the respondent

FOROMA J: This is an application for bail pending appeal. When the application was argued the court delivered an *ex-tempore* judgment dismissing third and fourth applicants' application and directing that first and second applicants consider pursuing their application before another judge appearing either in person or by counsel of each's own choice. The direction to separate the hearing of first and second applicant's application was occasioned by the midstream renunciation of agency by Mr *Tsarwe* who initially appeared representing all the applicants. The renunciation of agency midstream at the hearing was caused by a realization that there was a potential conflict of interest, which would prejudice first and second applicants in light of the nature of submissions in support of third and fourth applicants.

After separating first and second applicants' hearing Mr *Tsawe* continued with his mandate to represent the third and fourth applicants. After dismissing their application for bail in an *ex-tempore* ruling the applicants requested the court to provide detailed reasons for the

dismissal of their application as these would assist them formulate grounds of appeal in their proposed appeal to the Supreme Court. These are they.

Background to the application for bail

The applicants were convicted by the High Court of the murder of Aleck Kaitano by striking him with switches all over the body and cutting him with a machete below the knees causing injuries from which deceased died.

Applicants were sentenced each to 10 years imprisonment for the said murder. They were late in filing their notice of appeal against the conviction and had their delay in noting the appeal condoned by the Supreme Court on 10 August 2023.

The applicants noted an appeal against conviction only. It is not clear whether applicants were denied the right to appeal against sentence. However, the Supreme Court Order granting applicants condonation of late filing of appeal and extension of time to appeal does not indicate that the applicants were denied the right to appeal against sentence. The respondent in its response to the application for bail pending appeal avers that the applicants were granted leave to appeal against conviction only. After filing their notice of appeal against conviction applicants filed an application for bail pending appeal which the respondent opposed. After separating the applications as indicated herein above it is proposed to address the third and fourth applicants' arguments in support of their application.

In their statement in terms of r 90 of the High Court Rules 2021 applicants content that the trial court misdirected itself in invoking the doctrine of common purpose to find fourth applicant liable for the deceased's death and in support of this submission relied on the evidence of the witness Marshall Chikwanha who it is claimed testified that when the fourth applicant arrived at the crime scene the assaults upon the deceased had stopped since deceased was now injured. This summation of evidence is incorrect as it does not accord with the court's findings to the effect that the fourth applicant was restrained from assaulting the deceased by Kuda Gift Nechiva (Kuda) who apparently restrained all applicants (appellants).

While Marshal Chikwanha testified to fourth applicant having assaulted deceased moderately and not more than 5 times using a switch it is worth noting that he also testified that he saw the fourth applicant arriving. Although in its judgment, the court *a quo* did not compare

the evidence of Kuda Nechiva and Marshal Chikwanha on the roll played by fourth applicant in assaulting the deceased it is important to note that Marshal Chikwanha testified that he saw Kuda restraining the accused persons. Marshall Chikwanha did not remove fourth applicant from the other accused persons so restrained. He also told the court *a quo* that when fourth applicant arrived at the crime scene people had already stopped assaulting the deceased since he was now injured. This evidence was not accepted by the court *a quo* which preferred Kuda's evidence that he restrained all the four applicants from assaulting deceased.

It is therefore incorrect to suggest that fourth applicant was not present when deceased was being attacked by the accused. The court found that Kuda Nechiva restrained fourth applicant as well as the other three applicants from assaulting deceased suggesting the fourth applicant was present at the time deceased was being attacked by fourth applicants co-accused. It is therefore incorrect to say that fourth applicant did not form an association with co-perpetrators 1, 2 and 3 in assaulting deceased and this finding of that fact is unlikely to be disturbed on appeal bearing in mind the evidence on record.

The fact that fourth applicant moderately assaulted the deceased with a switch does not exonerate her from being a co- perpetrator. Section 196 A of the Criminal Law Codification and Reform Act is clear that a co- perpetrator can be liable as a co-perpetrator whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator. Besides there was no evidence that fourth applicant joined the assault of deceased after a fatal injury had been inflicted on deceased. Marshal Chikwanha's contention seems to be that the assault by fourth applicant having been moderate would not have contributed anything to the death of the deceased who had already been severely injured. This was the gravamen of fourth applicant's argument hence the reliance on s 58 of the Criminal Law (Codification and Reform) Act. The said contention is irrelevant for the simple reason that fourth applicant's conduct as a co- perpetrator need not have contributed directly or in any recognizable way to the commission of the crime. In the court's view.

The moderate assault of deceased by fourth applicant did not detract from her role as a co-perpetrator. Even if it had occurred after the deceased had seriously been injured that would

only be relevant to mitigation as long as her participation as a co-perpetrator had been established which it was *in casu*.

Since there is no appeal against sentence the submission on of fourth applicant's minimum role as urged would not affect the liability of the applicant in relation to conviction.

Third applicant claims that he did not assault the deceased. The evidence of Kuda Nechiva was categorical that he restrained third applicant from assaulting the deceased at the time that first and second accused were assaulting deceased. It is clear that the court a *quo*'s finding on credibility in favour of Kuda puts paid to the denials by third applicant as a co-perpetrator.

Therefore taken cumulatively it is clear that the evidence that each of the applicants assaulted both deceased at the relevant time dampens any prospects of success of the appellants' appeal. The correct approach in matters of bail pending appeal is common cause as confirmed by applicants' counsel's reference to the case of *S v Dzvairo & others* HH 2/2006 (PATEL J as he then was). The court took into account the fact that the risk of abscondment was enhanced by the fact that both applicants had experienced the rigors of imprisonment as a penalty. The fact that the applicants did not demonstrate by evidence that there is a likelihood of an undue delay in the determination of the appeal did not persuade the court to lean favourably towards emphasis of the applicant' right to liberty. After considering applicants' poor prospects of success on appeal coupled with the high risk of abscondment I did not find that positive grounds for granting bail existed in this case. For these reasons, I refused the applicants' bail pending appeal.

Tadiwa and Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners