

NICHOLAS MAKHOKHA ALUSAKA
and
MARGARET WAITHIRA KAMANDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 21 August 2017 & 23 August 2017

Bail Application

Mr *Chigoro*, for the appellant
Mr *Makoto*, for the respondent

CHAREWA J: This is an appeal against refusal of bail by the magistrate's court.

The applicants are facing two counts of unlawful entry in aggravating circumstances and one count of possession of articles for criminal use in contravention of s 131 and s 40 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It is alleged that on 26 June and 1 July 2017, the applicants, in the company of an accomplice, Mweru Kamau, who is still at large, broke into the complainants' premises and stole money and property valued at \$44 000, \$600.00 of which was recovered in the applicants' possession. Secondly, the applicants were found in possession of implements for criminal use.

In her ruling, the magistrate took into account the Constitutional right to a presumption of innocence and liberty of the applicants. However, she counter-posed this with the fact that the applicants are foreigners, being citizens of Kenya, whose likelihood for abscondment is high, particularly since they are facing serious charges with a high likelihood of a lengthy custodial term should they be convicted. Further, she noted that applicants offered no explanation as to why they were in Zimbabwe.

While I agree with counsel for the applicants that bail should not be denied unless there are compelling reasons, I find myself unable to disagree with the determination of the magistrate for the reason that the right to liberty is not an absolute right. The magistrate did

not therefore fail to uphold the dictates of the Constitution, but she counterbalanced them, as she was wont to, with the interests of the administration of justice.

Quite frankly, I do not know where the applicants find the interpretation that “compelling reasons” mean a “life or death” situation. For purposes of bail applications, compelling reasons merely refer to those situations with a high likelihood to promote or result in abscondment by an accused, such that there is a high risk of non-attendance at trial should an applicant be allowed his freedom before trial. In this case, the seriousness of the charge and the possibility of a lengthy custodial term were considered by the magistrate to warrant refusal to bail for fear that the applicants would abscond particularly since they are foreigners.

While the seriousness of an offence on its own is not enough to warrant refusal of bail, it is trite that, taking into account other factors, it is sometimes not in the best interest of justice to grant bail where the charges are serious.¹ In circumstance such as the present case where applicants have no permanent ties to Zimbabwe and hold no assets in Zimbabwe, the risk of absconding is always higher where the charges are serious enough to warrant lengthy imprisonment upon conviction. More particularly, where an applicant is a foreigner, chances of re-arrest are always more difficult should one abscond. It is not a secret that borders are porous, and one does not need to have a passport to travel from one country to the next such that even stringent reporting conditions may not suffice to ensure applicants remain within the jurisdiction pending their trial.

While the magistrate may not have specifically traversed the necessary factors for granting or refusing bail, more particularly, whether or not applicants have ties or assets in Zimbabwe or the means of travel, the record shows that these averments were made before her and witnesses gave testimony in this respect. After this full inquiry, the magistrate concluded that this not a case appropriate for the granting of bail. I am unable, in the circumstances to agree that she erred or misdirected herself.²

In any event, even if she had, it is trite that on appeal against refusal of bail, the court is at liberty to make its own findings whether or not to grant bail. In the instant case, and for reasons stated above, it is my view that the applicants are not appropriate candidates to be admitted to bail.

¹ J Nyambuya v S

² S v Ruturi HH 23/03

Accordingly, the application for bail is dismissed.

Chigoro Law Chambers, applicant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners