

ELIA KADUNGURE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE; 14 & 20 May 2024

Bail Appeal

A Jakarasi, for the appellant
Ms K H Kunaka, for the respondent

MUREMBA J: This is an appeal against refusal of bail by the Magistrates Court.

Bail is a legal concept that allows an accused person to be temporarily released from custody while awaiting trial. It ensures that accused persons are not unfairly detained before their trial. It upholds the right and principle that a person accused of an offence is presumed innocent until proven guilty.¹ Bail prevents unnecessary pretrial detention, allowing accused persons to continue their daily lives (with certain conditions) until their case is finalised. Section 50(1)(d) of the Constitution provides that, “*any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention.*” This constitutional provision emphasizes that any person who is arrested should be released either unconditionally or on reasonable conditions while awaiting their charge or trial. However, this release can be denied if there are compelling reasons justifying their continued detention. The goal is to balance individual rights with the need for justice.

Section 115C of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that grounds specified in s 117(2) allow a court to find that it is in the interests of justice to detain an accused person until they are dealt with according to the law. In other words, the specified grounds can serve as compelling reasons for denying bail before trial. Section 117 reiterates that a person who is in custody due to an offence is generally entitled to be released on bail. This entitlement exists from the time they appear in court on a charge until the sentence is imposed. However, there is an exception: if the court determines that it is in the interests of

¹ S 70(1) of the Constitution of Zimbabwe, 2013.

justice, the person may be detained in custody despite this entitlement. The court can refuse bail and detain an accused person if certain grounds are established:

- **Safety concerns:**
 - If there's a likelihood that releasing the accused on bail would endanger the safety of the public or a specific person.
 - If the accused is likely to commit an offence listed in the First Schedule.
- **Trial and witness concerns:**
 - If the accused is unlikely to stand trial or appear to receive their sentence.
 - If there's a risk that the accused might attempt to influence or intimidate witnesses or tamper with evidence.
- **System integrity concerns:**
 - If releasing the accused would undermine the objectives or proper functioning of the criminal justice system, including the bail system.
- **Public order and security concerns:**
 - In exceptional circumstances, if the release of the accused would disturb public order or undermine public peace or security.

The allegations against the appellant in the present matter are that on 18 April 2024, police detectives were on surveillance when they spotted the appellant selling Econet airtime at Avondale Shopping Centre. He was accepting United States Dollars at the rate of 1USD to ZiG15 without approval from the Reserve Bank of Zimbabwe. The police detectives approached him and pretended as if they wanted to buy airtime using ZiG. The appellant demanded 15ZiG for airtime of 1USD. The police detectives immediately arrested him and charged him with contravening section 5 (1) (a)(ii) of the Exchange Control Act [*Chapter 22:05*] as read with s 4(1)(a)(i) of the Exchange Control Regulations S.I 109 of 1996.

When the appellant appeared in the Magistrates Court on initial remand, he was denied bail. This is what prompted him to bring an appeal against the decision of the magistrate arguing that the learned magistrate erred in denying him bail as there were no compelling reasons for him to be denied bail. The magistrate denied bail to the appellant based on several factors: He said that the State had argued that the appellant was likely to abscond if granted bail. The State had submitted that it has proof of money transfer and accused the appellant of selling airtime at an unauthorized exchange rate (US\$1.00 to ZiG 15). The appellant did not provide a defence that the court found plausible. The appellant was apprehended at the scene of the alleged offence. The nature of the offence was serious, potentially attracting an effective custodial sentence. Considering the circumstances, the court believed the appellant posed a flight risk. To quote him *verbatim*, the learned magistrate said,

“Bail is a constitutional right unless there are compelling reasons justifying compelling reasons (sic). In this case State relied on one ground that he is likely to abscond if granted bail. State submitted that there is proof of money transfer and that accused was selling airtime accepting US\$ at a rate of US\$1,00 to ZiG 15 without approval from Reserve Bank of Zimbabwe. Accused does not give a defence in this case. He leaves everything to the State. He says: the State doesn't say the accused was dealing in foreign currency but was selling airtime. did not say accused transacted in foreign currency but merely offered to transact. He was caught at the scene and he does not give a defence which is plausible. He was at the scene. He has a case to answer. The offence is a serious one and attracts an effective custodial sentence to induce him to abscond. He is a flight risk. Bail is denied him.”

Mr *Jakarasi* for the appellant submitted that the court *a quo* erred in concluding that the appellant did not proffer a plausible defence when the facts indicate that the appellant is an airtime vendor who was arrested whilst he was conducting his business of selling airtime. Mr *Jakarasi* further submitted that the court *a quo* erred and misdirected itself in concluding that the appellant is a flight risk by reason of a mere possibility of an effective custodial sentence in the face of a penal provision with an option of a fine. He further submitted that the court *a quo* failed to take into account the circumstances of the appellant's arrest which showed that he was unlikely to abscond. He further submitted that the offence attracts a fine and as such the appellant who is a person of fixed abode and who at all times cooperated with the police, will not be tempted to flee.

Ms Kunaka for the State submitted that the court *a quo* did not err or misdirect itself in denying the appellant bail because the appellant did not proffer a defence at all. She went on to submit that the appellant would have assisted the court greatly if he had done so. She further submitted that while it is true that the penal provision allows for a fine, the risk of absconding remained high in this case as the offence is aggravated by the fact that the ZiG is relatively a new currency which the Reserve Bank of Zimbabwe introduced in trying to tackle hyperinflation after its predecessor, the Zimbabwe Dollar plunged in value. Efforts are still being made to ensure that there is acceptance and stability of the new currency with the government compelling businesses to use the official exchange rate. Without approval from the Reserve Bank, the appellant sold airtime of 1USD for ZiG15. There is strong evidence against the appellant. The court is unlikely to settle for a non-custodial sentence in light of the aggravatory features which will induce the appellant not to stand trial.

When a court considers bail, it exercises discretion by weighing various factors and striking a balance between the accused's right to liberty and the interests of justice. Higher courts or appellate courts generally avoid interfering with the lower courts' discretion unless there is a misdirection. It is not enough for the appellate court to disagree, there must be an

error. Examples include acting on wrong principles, considering irrelevant factors or making factual mistakes. This was enunciated in the case of *S v Gomana* (Criminal Appeal SC 320 of 2020; SC 166 of 2020) [2020] ZWSC 166 (25 November 2020) by UCHENA JA who said,

“Counsel for the respondent correctly submitted that the granting of bail involves an exercise of discretion by the court of first instance. It is trite that an appellate court will not interfere with the exercise of discretion by a lower court or tribunal unless there is a misdirection. It is not enough that the appellate court thinks that it would have taken a different view from the trial court. It must appear from the record of proceedings that there has been an error made in the exercise of discretion such as that the trial court acted on a wrong principle; allowed extraneous or irrelevant considerations to affect its decision or made mistakes of fact or failed to take into consideration relevant matters in the determination of the question before it. See *Barros & Anor v Chimponda* 1991 (1) ZLR 58 (S); *Aitken & Anor v Attorney General* 1992 (1) ZLR 249 (S).”

What is apparent from the ruling of the court *a quo* in the present matter is that safety, witness, criminal justice system and the bail system integrity, public order and security concerns did not affect the determination of the matter. The court *a quo*'s concern was that the appellant was a flight risk because he faces a serious charge potentially attracting an effective custodial sentence. He was caught at the scene of crime and he did not give a plausible defence. It is my considered view that the learned magistrate erred by not taking into account that the offence the appellant is charged with also carries a fine. The penal provision stipulates that the offence carries both a fine and imprisonment as the court deems fit yet the learned magistrate said, “*The offence is a serious one and attracts an effective custodial sentence to induce him to abscond*” The learned magistrate made it appear as if the offence has no option of a fine or community service in the event of a conviction. With offences with dual penalties of a fine and imprisonment, courts have the discretion to choose either or both penalties based on the circumstances of the case. The court considers multiple factors such as the severity of the offence, the accused's background, and the interests of justice. More serious offences often warrant imprisonment whilst less serious offences warrant monetary fines. Essentially, the court has flexibility in determining the appropriate punishment between a fine and imprisonment yet the learned magistrate in this case did not seem to have been alive to that in his ruling. He did not discuss why he says in the circumstances of the present case, the appellant a vendor who is alleged to have been selling airtime of 1USD for ZiG15 does not qualify to be sentenced to a fine. The State papers do not even state how much airtime the appellant had sold. In addition, the learned magistrate did not discuss the likely period of imprisonment the appellant is likely to undergo in the event of a custodial sentence being imposed on him considering the circumstances of his case. It must be noted that the penal provision does not

state the maximum level of fine or imprisonment that the court can impose. The amount of fine and the period of imprisonment is as the court deems fit. So, the period of imprisonment can be anything from a few days to several years depending on the circumstances of the case. It is therefore a misdirection to deny bail on the basis that the accused is likely to be sentenced to imprisonment without an indication of the likely period.

An offence which attracts a fine or a likely period of a few days or a few months' imprisonment does not warrant the court to refuse bail without considering that bail could be granted with conditions to ensure the appellant's appearance at trial. In *casu* there was no evaluation of the appellant's cooperation with the police from the time of his arrest, his ties to the community, employment and family yet it is submitted that the appellant is 29 years old and has a wife and three minor children. He is of fixed abode. Although he has a passport, he has never travelled outside the country. There was also no evaluation of alternative measures to address concerns to do with the risk of abscondment such as reporting conditions. The learned magistrate did not discuss why he was of the view that reporting conditions and the surrendering of travel documents by the appellant would not address the State's fears that the appellant would abscond. This is more so in view of the fact that the appellant did not resist arrest or attempted to flee at the time of his arrest.

In a bail application it is essential for the court to evaluate all relevant factors, both in favour of and against the granting of bail. The process is not considered fair if only the reasons why the State is opposed to bail are taken into account. The presumption of innocence is a fundamental principle, and bail decisions should be made with this in mind, ensuring that the accused's rights are also considered alongside the interests of justice and public safety. It is important that the court's discretion is exercised judiciously, taking into account all the circumstances of the case. Denying bail effectively treats the accused as guilty before trial, which undermines the presumption of innocence. Depending on the nature of the case, in cases where there is no fear that the accused will commit further crimes; public safety will be threatened or public order will be disturbed or public peace or security will be undermined by the granting of bail, instead of outright denial of bail, courts should consider alternative measures to address concerns such as the risk of abscondment and the risk of interference with witnesses. This is more so when the accused did not flee, did not attempt to flee, did not resist arrest or did not interfere with witnesses or attempt to do so. An accused's failure to provide a defence or a plausible defence in the court's view should not be taken in isolation, but should be considered as part of the overall assessment of all the factors.

At the hearing of this appeal, I asked the State counsel what she thought would be the length of the custodial sentence in the event of a conviction since she was opposed to the appeal. She said may be two months' imprisonment. When I then put it to her that for more serious offences such as rape and murder which attract several years of imprisonment, accused persons are granted bail pending trial, she then conceded that the appellant be granted bail on the conditions proposed in the draft order. Despite the concession to bail by the State counsel, I thought it prudent to write this judgment as a way of guiding the lower court.

In the result, it is ordered that the decision of the court *a quo* refusing the appellant bail pending trial is hereby set aside and substituted with the following order.

1. The appellant shall deposit the sum of USD100.00 or its equivalent in ZiG with the Clerk of Court at Harare Magistrates Court.
2. The appellant shall continue residing at number 145 Bishop Gaul, Harare until the matter is finalised.
3. The appellant shall report to Avondale Police Station twice a week on Mondays and Fridays between 6am and 6pm until the matter is finalised.
4. The appellant shall not interfere with witnesses and investigations.
5. The appellant shall surrender his passport to the clerk of court, Harare Magistrates Court.

Madzima & Company Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners