

**IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)**



HPBA/07/201

BETWEEN:

ISAAC MUSADABWE

APPELLANT

AND

THE PEOPLE

RESPONDENT

**BEFORE HON MRS JUSTICE S. M. WANJELANI, THIS 7TH DAY
OF MAY, 2018**

***For the Appellant : Mr. G. Mhango, Messrs Ganje Mhango and
Company***

***For the Respondent: Mrs. M. K Chitundu, Deputy Chief State
Advocate, National Prosecution Authority***

RULING

CASES REFERRED TO:

1. *Gift Mulonda V the People(2004) ZR 135*
2. *Anjur Kumar Rathi Krishna V The People 2011 VOL 3 ZR 1*

LEGISLATION REFERRED TO:

1. *The Penal Code, Chapter 87 of the Laws of the Republic of Zambia.*
2. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.*

This is a Ruling on an application for Bail Pending Appeal. The application is made pursuant to **Section 332(1) of the Criminal Procedure Code** by the Appellant and it is supported by an Affidavit sworn by the Appellant, filed on 18th April, 2018, wherein he deposed that he has appealed against the decision of the High Court to uphold the conviction of the Subordinate Court for the Offence of Defilement and the sentence of 15 years imprisonment with hard labour. It was his contention that he stood a chance that his appeal would be allowed. The Appellant added that he was ready to abide by the reasonable conditions that the Court would impose as he was in a position to provide sureties to the Court's satisfaction.

The Respondent filed an Affidavit in Opposition on 26th April, 2018, wherein it was averred that the Court was dealing with a Convict and Bail pending Appeal should be granted where exceptional circumstances so warrant, and this application had revealed none. It was also averred that Appeals do not take long and the Convict would not have served a substantial part of the 15 years by the time the appeal is heard and further that the record was not bulky such that it would take long to prepare.

It was further contended that there was no likelihood of success and granting the bail would prejudice the State in the effective prosecution of the matter.

At the hearing, both Counsel relied on their respective Affidavits. Counsel for the Appellant submitted that the Convict was of fixed

abode who could provide sureties and there was likelihood of the Appeal succeeding. He submitted that this was premised on the fact that the Record of Proceedings does not show that the *Proviso to Section 138(1)* of the **Penal Code** was explained to the then Accused person and further relied on the case of **Gift Mulonda V the People**⁽¹⁾, where the Supreme Court held that not explaining the said *Proviso* to the Accused person was fatal.

It was further submitted that the Respondent would not suffer any injustice because in the event that the Appeal failed, the appellant would still serve the 15 years whereas it would be a greater injustice if the Appellant was denied bail and kept in jail only for the conviction to be quashed after he had served some jail time.

Counsel for the Respondent submitted that granting of bail is in the Court's discretion and must be premised on the exceptional circumstances that should be illustrated by the Appellant, including the prospects of success whereas there was no likelihood of success in this case. This was premised on the fact that the ground being relied upon for the appeal was that the *Proviso* was not explained to the then Accused person, but the latter was represented by Counsel throughout the proceedings, who could have raised the issue at the earliest possible time.

She contended that the Record does not normally even show the Charge. She reiterated that the appeals do not take long and there was no possibility that the Appellant would have served substantial part of the sentence by the time the appeal would be heard.

In conclusion, reference was made to the pronouncements in the case of **Anjur Krishna V the People**⁽²⁾, regarding principles to be considered in determining exceptional circumstances in granting bail pending appeal.

In reply, Counsel for the Appellant submitted that there was no exception that if an Accused person is represented, then there be less adherence in the manner of taking Plea.

I have considered the application, the respective Affidavits and the submissions by the respective Counsel. **Section 332** of the Criminal procedure provides that:

“332. (1) After the entering of an appeal by a person entitled to appeal, the appellate court, or the subordinate court which convicted or sentenced such person, may, for reasons to be recorded by it in writing, order that he be released on bail with or without sureties, or if such person is not released on bail shall, at the request of such person, order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal”.

Thus for any convict to be eligible for bail pending appeal, they must have entered an appeal.

The records show that the Appellant was convicted on 16th February, 2018 in the Subordinate Court and sentenced by the High Court on 16th April, 2018. He then filed a Notice of Intention

to Appeal on 18th April, 2018 and this Application for Bail Pending Appeal on the same day. Thus the Appellant herein has fulfilled the requirements of this provision.

The gist of the argument by the Appellant is that the Appeal has merit and that he is ready to abide by any reasonable conditions that the Court would impose including providing sureties, while the Respondent contends that the appeal is unlikely to succeed.

I have carefully considered the exceptional circumstances argued based on the **Krishna**⁽²⁾ case as entitling an Applicant to be admitted to bail pending appeal as including prospects of success of the appeal and the Applicant having served a substantial part of the sentence by the time the appeal is determined. I also take cognizance of the guidance in the same case that:

"It is important to bear in mind that in an application for bail pending appeal, the Court is dealing with a convict and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal".

In relation to prospects of the Appeal succeeding, it was stated that:

"it is not for the court to delve into the merits of each ground, but it suffices that all the grounds are examined, and a conclusion is made that prima facie, the prospects of success of the appeal are dim".

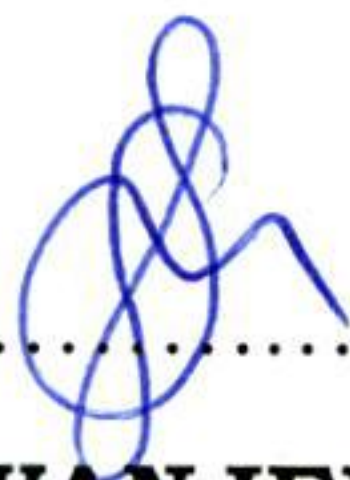
I have also considered the guidance and circumstances considered by the Supreme Court in the **Gift Mulonda**⁽¹⁾ case cited by the

Appellant's Counsel. A perusal of the record reveals that the Appellant was represented throughout the proceedings by Counsel, and without delving into the merits of the case, it is my view that the grounds of the appeal do not reveal prima facie, that the Appeal will succeed without hearing the Parties' substantive arguments during the Appeal proceedings.

In relation to the delay in processing the Record for the Court below for purposes of the Appeal, I do not believe this would take log considering that the Record of proceedings is already available, having being prepared for purposes of Sentencing by the High Court.

Thus on the totality of the facts and cited authorities herein, I find that there are no exceptional circumstances that would warrant the exercise of this Court's discretion to grant the Appellant bail pending Appeal. This application accordingly fails. Leave to Appeal is granted.

Dated at Lusaka this 7th day of May, 2018.



S.M WANJELANI
HIGH COURT JUDGE