

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT KABWE
(CRIMINAL JURISDICTION)**

HBR/02/11

**IN THE MATTER: SECTION 33(1) OF THE CRIMINAL PROCEDURE CODE,
CAP 88 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: SECTION 337 OF TH CRIMINAL PROCEDURE CODE
CAP 88 OF THE LAWS OF ZAMBIA**

B E T W E E N:

MWALA KALALUKA	APPLICANT
AND	
THE PEOPLE	RESPONDENT

**Before Honourable Madam Justice M.S. Mulenga in chambers on the 2nd
day of February, 2011 at 09.30 hours in the forenoon.**

**For the Applicant: Mr. Andrew Chewe of Messrs MNB Legal practitioners
Mr. Sam Mujuda – Legal Counsel Post Newspapers**
**For the Respondent: Ms. M. Mwalusi – Acting Senior State Advocate
Ms. M.G. Kashishi – State Advocate**

RULING

This was an application for review of the Subordinate’s court decision declining to grant bail under Section 123(1) of the Criminal Procedure Code (CPC) chapter 88 of the Laws of Zambia. The application was brought pursuant to Section 337 of the Criminal Procedure Code and was considered in line with Section 388 as it was brought to the knowledge of the court. After hearing both counsel for the Applicant and Respondent, the issues for review were:

1. The refusal by the learned magistrate to entertain the application for bail under Section 123 of the Criminal Procedure Code because the applicant was not yet before court.
2. The refusal by the learned magistrate to review his decision, upon the production of new material/authority, on the basis that the matter was *functus officio*.

On perusal of the record, I was satisfied that the matter was wrongly before the Subordinate Court for the reasons I shall state below. I was thus mindful to treat the application as a fresh matter. However, I did not get to do so as during the hearing on 20th January, 2011, it came to my attention that the application had been overtaken by events in that the applicant had since been charged and released on bond the previous day. The matter was now therefore academic but since it raised important procedural issues, I felt it proper to address the issues raised for the record.

The brief facts were that the applicant was detained by the police, on 17th January 2011 at 10.00 hours while travelling from Lusaka to Kabwe, on suspicion that he was inciting violence in Western Province. Over 48 hours had passed and he was still being kept in custody without being charged or appearing before any court in breach of Section 33 of the Criminal Procedure Code. An application was made for bail pending trial under Section 123 of the Criminal Procedure Code before the Learned Magistrate who declined to grant it on the basis that he could only entertain bail applications when the State commenced proceedings against the applicant. After making his ruling, an authority material to the proceedings was brought to the attention of the learned Magistrate upon which he was requested to review his decision. He declined stating that the matter was *functus officio*. Both sides made pertinent oral submissions on the two matters for the consideration of the court.

I will not dwell on whether a magistrate court has jurisdiction to review its own decision rendered in the course of proceedings. This is due to the fact that the State conceded that the Magistrate Court had jurisdiction to review its decision in the course of the proceedings for the particular session/day. The power to review can be exercised by the court on its own motion or on application by a party to the proceedings. At the close of the proceedings of the particular day, the matter then becomes *functus officio*. This power to review is discretionary and

Magistrate Court can either entertain or throw away the application and an aggrieved party had a right to appeal to the High Court in such matters. I wish to add that when it comes to an application for bail, the applicant if denied bail today, may apply for it again on another or subsequent day and has a right to be heard denovo again without being hindered by the arguments of the matter being functus officio.

On the issue whether the magistrate court has jurisdiction to hear bail applications regarding persons who were not before it or who had not yet been brought to the court, the parties had divergent views. Mr. Chewe argued that the construction and disjunctures in Section 123 of the Criminal Procedure Code clearly prescribed two distinct instances when the courts could grant bail, namely when a person had been arrested or detained and when a person appeared or was brought before court and that the magistrate court had jurisdiction in both instances. He cited the case of in **RE SIULUTA AND THREE OTHERS (1979) ZR 14 (H.C)** which was on all four with the present application and where this court had granted applicants bail when they were detained without being charged contrary to Section 33 of the Criminal Procedure Code. Ms. Mwalusi on the other hand submitted on the authority of Section 123, the court could only grant bail to persons that had been charged and brought before it at any time during the proceedings. Further, that bail pending trial as the name implied presupposed that there was going to be a trial and thus granted in those circumstances. Where the matter was not before court, the proper course was to make an application for habeas corpus.

The Criminal Procedure Code provides for bail in general under Section 123 and for bail pending appeal under Section 336.

Section 123 of the Criminal Procedure Code reads:

“(1) When any person is arrested or detained, or appears before or is brought before a subordinate court, the High Court or Supreme Court he may, at any time while he is in custody, or at any stage of the proceedings, before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the police officer concerned or court, to secure his appearance, or be released upon his own recognizance if such officer or court thinks fit:

Provided that any person charged with

- (i) Murder, treason or any other offence carrying a possible or mandatory capital penalty;*
- (ii) Misprision of treason or treason-felony; or*
- (iii) Aggravated robbery;*

Shall not be granted bail by either a Subordinate Court, the High Court or Supreme Court or be released by any police officer.

- (2) Subject to provisions of section one hundred and twenty six, before any person is admitted to bail or released on his own recognizance, a bond (hereinafter referred to as a bail bond), for such sum as the court or officer, as the case may be, thinks sufficient, shall be executed by such person and by the surety or sureties, or by such person alone, as the case may be, conditioned that such person shall attend at the time and place mentioned in such bond and at every time and place to which during the course of the proceedings the hearing may from time to time be adjourned.*
- (3) The High Court may, at any time, on the application of an accused person, order him, whether or not he has been committed for trial, to be admitted to bail or released on his own recognizance, and the bail bond in any such case may, if the order so directs, be executed before any magistrate.*
- (4) Notwithstanding anything in this section contained, no person charged with an offence under the State Security Act shall be admitted to bail, either pending trial or pending appeal, if the Director of Public Prosecutions certifies that it is likely that the safety or interests of the Republic would thereby be prejudiced.*
- (5) Notwithstanding anything to the contrary contained in this Code or in any written law, it is declared for the avoidance or doubt that upon a person being convicted or sentenced by a subordinate court and before the entering of an appeal by such person against the conviction or sentence or both, the subordinate court which convicted or sentenced such person or the High Court*

has and shall have no power to release that person on bail with or without securities.” End of quote

Therefore the bail provided for in Section 123 is wide and is not restricted to bail pending trial because in some cases there might not be any trial at the end of a long and inordinate detention. Sub Section (1) lists four (4) institutions that can grant bail in the particular circumstances laid out. These are Subordinate Court, High Court, Supreme Court and Law Enforcement Agencies, in particular, the police. Indeed there are two parts to the instances when bail can be granted as argued by counsel for the applicant. This is when a person is arrested or detained, or when he appears before or is brought before a court. He may while he is in custody or at any stage of the proceedings before such court, be admitted to bail at the discretion of the concerned police officer or the court with the exception of persons charged with the listed offences.

In interpreting this subsection therefore, one must try and ascribe to it the ordinary meaning taking into account the normal or standard practice. Thus considering the two instances provided for, the normal practice is for the courts to grant bail to a person appearing or brought before it while the police ordinarily grant bail to those arrested or detained before being brought before any court. The converse is also true that the police cannot grant bail to a person who is appearing before court as the jurisdiction shifts. This seems to me to be the logical interpretation of the disjunctures in sub Section 1. Therefore, the Subordinate Court only has jurisdiction over the persons that have been brought or are appearing before it. In this instance and others where one is not yet brought or appearing before it, does not have jurisdiction to grant such bail.

However, the High Court has power to grant bail to a person who is not appearing or brought before any court and has been inordinately detained. This flows from its inherent and original jurisdiction in respect of all matters including those dealing with fundamental or constitutional rights such as the right to freedom/liberty which is at issue in such matters. Hence, notwithstanding that a detained person has not been brought before any court, the High Court may on application by the concerned person admit such to bail. This interpretation is in line with the cited case of SIULUTA where this court granted bail to persons in similar circumstances,

namely, where the applicant were being detained but not charged with an offence in contravention of Section 33 of the Criminal Procedure Code.

The application for bail in this matter was therefore wrongly before the Subordinate Court which had no jurisdiction to entertain it. Thus cases where a person is arrested or detained but not brought before any court in breach of the provisions of Section 33 of the Criminal Procedure Code, only the police and the High Court may be able to grant that person bail in accordance with Section 123 of the Criminal Procedure Code.

Section 123 further provides in subsection 3 for the High Court, on application by an accused person, to discretionarily admit him to bail whether or not such person has been committed for trial. Although the term accused person is not defined both in the Criminal Procedure Code and the Penal Code, it can reasonably extend to suspects being held by law enforcement agencies. Suffice to state, as submitted by the State Advocate, that besides bail as provided for in Section 123, there are other avenues available to persons in such circumstances to secure their liberty.

Having found that the Subordinate Court did not have jurisdiction to hear the application, I will not deliberate on the comments made and issues raised in the ruling by the learned Magistrate, but only to state that it is not for the court to speculate on possible decisions of the law enforcement agencies to which it is not privy. The court must adjudicate on a matter based on the issues raised before it by the parties and when new issues later arise, these are to be dealt with in line with the laid down procedures.

As stated at the beginning, I will not make any order as to review as this will serve no real purpose considering the current status of this case and the findings above. This ruling is for the purpose of putting the record straight on the important procedural issues that were raised.

M.S. Mulenga

JUDGE