

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

HPA/21/2011

BETWEEN:

FAUSTIN KABWE
AARON CHUNGU

V

THE PEOPLE

Before the Hon. Mr. Justice Dr. P. Matibini, SC, Hon. Mrs. Justice Banda-Bobo and Hon. Mrs. Justice Milimo Salasini, this 17th day of May, 2011.

For the Applicant: Mr. K. Chenda of Messrs Simeza Sangwa and Associates.

For the Respondent: Mr. P. Mutale Acting Deputy Chief State Advocate in the Director of Public Prosecutions Chambers.

RULING

Case referred to:

1. *Stoddard v The Queen [No.1] N.R.L.R. 288*

Legislation referred to:

1. *Constitution of Zambia, Cap 1, Articles 12 and 18.*
2. *Criminal Procedure Code Cap 88, ss. 123 to 133.*

This is an application by Mr. Aaron Chungu to vary bail conditions and leave to travel out of the jurisdiction. We shall continue to refer to him as the applicant. The applicant was together with Mr. Faustin Mwenya Kabwe, earlier on, granted bail on 19th August, 2009, by Hon. Mr. Jones Chinyama, then Principal Resident Magistrate on the following conditions:

1. K 100, 000, 000=00, each in their own recognizance;
2. Each to provide two working sureties of reputable occupation in the sum K 50, 000, 000=00 per surety: and

3. Each to surrender their passport to the Senior Clerk of Court.

The application to vary the conditions of bail is supported by an affidavit sworn by the applicant, dated 5th April, 2011. The applicant deposes in the affidavit as follows: He was convicted by the Subordinate Court at Lusaka in cause number SSP/13/2004 for commission of the offence of corrupt practices with a public officer. Upon conviction, and sentence, the applicant was granted bail pending appeal to the High Court.

Over the period, the applicant has developed chest pains which have progressively increased in severity. And which condition the local doctors suspect to be *Angina*. The local health institutions currently lack the requisite facilities to diagnose the condition and have advised that he seeks medical attention outside the country.

The applicant has produced in the affidavit two copies of letters issued by Dr. K. G. Dave, a consultant, physician, and cardiologist with CFB Medical Centre, and Dr. Justin Kangwa of the University Teaching Hospital, (UTH) dated 26th January, and 18th February, 2011, respectively. In essence, the applicant has been advised to undertake tests of *coronary angiography* outside the country. The combined effect of the letters by Dr. Dave and Dr. Kangwa, is that the tests could be undertaken either in South Africa or India, because the facilities for the test in question are not currently available in Zambia.

The affidavit in support of the application is unopposed.

However, when the matter was called on 21st April, 2011, Mr. P. Mutale, Acting Deputy Chief State Advocate in the Director of Public Prosecutions Chambers sought to adjourn the matter to enable him obtain instructions. The application was

opposed by Mr. Chenda; counsel for the applicant. In opposing the application, Mr. Chenda argued that the process relating to the application was served on the respondent on 5th April, 2011. And therefore Mr. Mutale had ample time to take instructions. Mr. Chenda further pressed that the application was urgent considering that it touched on the health and life of the applicant. The urgency of the application is in any event, Mr. Chenda submitted, confirmed by a certificate of urgency.

As much as we empathised with the arguments and submissions, by Mr. Chenda, we considered that it was in the interest of justice to give the respondent an opportunity to take instructions on the matter, and possibly file an affidavit in opposition. Accordingly, we allowed the application, and stressed nevertheless that we expected counsel to exchange pleadings on or before 29th April, 2011. Thus, the matter was adjourned to 3rd May, 2011, for continued hearing.

On 3rd May, 2011, when the matter was called, Mr. Mutale was not present. Instead, Mrs. M. P. Lungu, a State Advocate also in the Director of Public Prosecutions Chambers stood in for Mr. Mutale, apparently at the behest of Mr. Chenda. As we expected, Mrs. Lungu was not ready to proceed with the application. Mrs. Lungu informed us that she did not have conduct of the matter. And that she had not in any case familiarized herself with the matter. In the circumstances, Mrs. Lungu applied for an adjournment to enable her also obtain instructions and possibly file an affidavit in opposition.

Mr. Chenda objected to the application. Firstly, he reiterated his argument earlier on that the process had been served on the respondent as far back as 5th April, 2011. Secondly, Mr. Chenda submitted that at the last sitting we had directed that the pleadings in this matter should be exchanged and concluded by 29th April, 2011. Thirdly, Mr. Chenda argued that even assuming that Mutale's absence was

attributable to his illness as stated by Mrs. Lungu, Mr. Mutale should have had the courtesy of informing the Court by filing, timeously a Notice to Adjourn.

We agreed with the submission by Mr. Chenda and thus refused the application to adjourn the matter. Further, we deprecated the failure by Mr. Mutale to attend Court. We must state at once that it beholds counsel to file a Notice to Adjourn, if counsel is for whatever reason unable to attend to an appointment with a Court. We therefore considered it an act of discourtesy to the Court for counsel to absent himself from proceedings without notice, reasonable excuse, or explanation whatsoever.

Be that as it may, we allowed Mr. Chenda to proceed with the instant application. Mr. Chenda submitted that the factual basis of the application is set out in the affidavit in support dated 5th April, 2011. The basis of the application is that it is suspected that the applicant may be suffering from *Angina*. The diagnosis of this condition, Mr. Chenda submitted, is beyond the medical technology available in Zambia. This assertion, Mr. Chenda submitted, is confirmed by the letters of Dr. Dave and Dr. Kangwa referred to above.

Mr. Chenda argued further that although the applicant is a convict in the Court below and an appellant before this Court, he is a human being whose right to life is guaranteed by Article 12 of the Constitution. Furthermore, Mr. Chenda argued that the relief sought would not in any way prejudice the respondent for the following reasons. Firstly, there is no record or evidence to suggest that the applicant is a flight risk. Secondly, the applicant is a Zambian citizen who is permanently resident in this country. Thirdly, the applicant has not requested that he should be accompanied by his family. Fourthly, the applicant has in the past complied with bail conditions imposed by the Court below, as well as before this Court. Lastly, that the relief sought would not disrupt the pending appeal. Thus Mr. Chenda urged the Court to vary the bail conditions by releasing the applicant's passport subject to

whatever terms and conditions that the Court may deem proper in the circumstances.

In response, Mrs. Lungu submitted that she did not have sight of the case record. As a result, she was not in a position to make any meaningful representations or response. Thus Mrs. Lungu repeated her plea to adjourn the matter to enable her familiarize herself with the record before making a measured response. At that juncture, Mr. Chenda resigned to opposing the application to adjourn. Thus we allowed the application to enable Mrs. Lungu make an informed response. The matter was accordingly adjourned to 6th May, 2011, for continued hearing.

When the matter was called on 6th May, 2011, Mrs. Lungu did not turn up. Instead, Mr. Mutale re-appeared with a Mr. D. C. Mwinga, also a State Advocate in the Director of Public Prosecutions Chambers. At the outset Mr. Mutale apologized profusely for the embarrassment and inconvenience caused by his absence at the previous sitting. Mr. Mutale explained to us that he had in fact delegated the matter to Mr. Mwiinga. Mr. Mwiinga had also in turn, unfortunately recorded a wrong return date in his diary. Hence his absence at the last sitting. We accepted Mr. Mutale's apology.

To continue with the narration, Mr. Mutale submitted that the position of the respondent in this matter is that it has no objection to the application. However, Mr. Mutale submitted further that the application should be allowed subject to the conditions which we might deem proper to impose in the circumstances. Lastly, Mr. Mutale submitted that if we are inclined to allow the application, then we should stipulate the time frame within which the applicant should be allowed out of the country.

In reply, Mr. Chenda submitted that the applicant was not in a position to state the time limit because it would have been presumptuous for the applicant to proceed to make appointments with the relevant medical institutions, in the absence of an order varying the bail conditions. Mr. Chenda nonetheless urged us to be flexible in this regard.

We are indebted to counsel for the submissions and arguments in this matter. The provisions governing applications for bail are contained in sections 123 to 133 of the Criminal Procedure Code (CPC). Section 123 in particular gives Courts the discretion to grant or not to grant bail. The considerations that are taken into account in the exercise of the discretion whether or not to grant bail depends on the stage of the proceedings the application has been made.

In general, the threshold for bail pending trial tends to be lower because in terms of Article 18 (2) of the Constitution, every person who is charged with a criminal offence is presumed innocent, until he is proved or has pleaded guilty. In deciding whether or not to grant bail pending trial, the primary concern for the Court is to satisfy itself that if an accused is granted bail is he or is she likely to attend Court at the resumed hearing.

Unlike bail pending trial, bail pending appeal is granted with reserve because the applicant is a convicted person and the conviction is good unless and until an appellate Court quashes the conviction. In this respect, the law is very stringent. To illustrate, the case of *Stoddard v The Queen (No.1)* 5 N.R.L.R. 288, laid down the often quoted principle that a convicted person should not be released on bail pending appeal unless exceptional circumstances are disclosed. This principle may be distilled as follows. First, that a convicted person should not be released on bail. Second, that where however exceptional circumstances are disclosed, a convicted person may be released on bail pending appeal. In the context of this application it

is obviously unnecessary to delve into what may at law constitute exceptional circumstances because in any case bail was granted by the Court below.

The issue in the instant application is very narrow. Namely, the applicant is seeking leave of the Court to vary the conditions of the bail granted on 19th August, 2009, to enable him travel outside the country for medical attention. Applications for variation of bail conditions are governed by section 126 (3) of the CPC. Section 126 (3) enacts as follows:

"The High Court may in any case direct that bail or deposit requested by a Subordinate Court or by a police officer be reduced or may vary or add to any condition imposed under the provisions of section 124."

We acknowledge the force in Mr. Chenda's submission that in the instant case: there is no record or evidence to suggest that the applicant is a flight risk; he is a Zambian citizen permanently resident in this country; will not be accompanied by his family; has previously complied with bail conditions; and that his departure from the country will not disrupt the pending appeal before us.

However, it is important to observe that the status of the applicant is that of a convict. As a convict, the applicant does not enjoy the same status as that of a free, or innocent person. A convict does not also enjoy the same status as a person who is facing criminal charges, but he is nonetheless deemed or presumed by the Constitution to be innocent unless and until proved guilty in criminal proceedings. It is for that reason that bail pending appeal ought to be granted with utmost circumspection, and in exceptional circumstances. In cases of this nature, there exists the obvious tension between the health concerns of an applicant, and the potential risk of flight; especially where an applicant has to travel outside the country. A reasonable balance therefore needs to be struck between the two competing interests referred to above.

We have already stated that the nub of the application is that the applicant would like to travel to either South Africa or India to consult physicians. From the research we have conducted, the condition which the applicant is suspecting to be suffering from is known as "*Angina*." It is a coronary heart disease. Its diagnosis is undertaken through a procedure known as *Angiography*. *Angiography* is a medical imaging technique used to visualize the inside or lumens, of blood vessels and organs of the body with particular interest in the arteries veins and heart chambers. This is traditionally done by injecting a radio opaque contrast agent into the blood vessel and imaging using x-ray based techniques. It is a test that can be done within a period of about three hours.

In view of the foregoing we have made the following findings. The applicant is a convict who suspects that he may be suffering from a condition known as *angina*. There is no technology available in the country to diagnose this condition. However, this condition may be diagnosed in the republic of South Africa. The procedure which is employed in conducting the diagnosis is known as *Angiography*. And takes about three hours to conduct. It is therefore in the interest of the applicant to undergo the test. We have also taken judicial notice of the fact that currently it is possible to fly to South Africa as early as 07:00 hours in the morning, and return the same day in the evening at 19:00 hours.

In light of the preceding findings, we hereby vary the bail conditions to enable the applicant to travel to the republic of South Africa, subject to the following terms and conditions.

1. That the applicant is required to secure, in advance and confirm (vide documentary evidence) the appointment with the medical institution that will undertake the test with the Clerk of Court;
2. The applicant shall further confirm in advance with the Clerk of Court his itinerary and supply proof that he has purchased the requisite return air ticket;
3. The applicant shall be escorted to South Africa by a police officer who shall throughout the journey to, and from South Africa have custody of the applicant's passport;

4. The applicants passport shall be released by the Clerk of Court to the appointed Police officer upon been satisfied that the conditions in paragraphs 2 and 3 above have been satisfied;
5. The cost of the travel for the Police officer shall be met by the State and;
6. The applicant is granted leave to travel to South Africa on the day of the appointment, and is required to return to Zambia on the same day; and
7. That upon return from South Africa the Police officer accompanying the applicant shall return the passport to the Clerk of Court.

**Dr. P. Matibini, SC.
HIGH COURT JUDGE**

**Hon. Mrs. Justice Banda-Bobo
Salasini
HIGH COURT JUDGE**

**Hon. Mrs. Justice Milimo
HIGH COURT JUDGE**