

IN THE HIGH COURT FOR ZAMBIA

HPBA/05/2012

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

DELNESA MELAKU

Applicant

and

THE PEOPLE

Respondent

**Before the Honourable Madam Justice F. M. Lengalenga
this 9th day of March, 2012 in chambers at Lusaka**

For the applicant : Mr. L. Eyaa - Messrs KBF &
Partners

For the respondent : Mrs. M. K. Chitundu - Assistant
Senior State Advocate

R U L I N G

Cases cited:

- 1. OLIVER JOHN IRWIN v THE PEOPLE (1993-94) ZR 7 (SC)**
- 2. MARIOTI KATENGA JAM v THE PEOPLE (1981) ZR 99 (SC)**
- 3. KAYUMBA v THE PEOPLE - SCZ/9/77/2011**

This is the applicant, Delnesa Melaku's application for bail pending appeal to the High Court made pursuant to section 332 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia. The said application is supported by an affidavit sworn by one Delnesa Melaku, the applicant herein and skeleton arguments filed herein on 5th and 9th March, 2012 respectively. In the said affidavit, Delnesa Melaku deposed that he is an Ethiopian national residing in Zambia and that he regularly resides at Flat No. B, Plot 14A Kilimanjaro Road, Makeni in Lusaka and is currently in a Lusaka prison. He deposed further that on 29th February, 2012, he was convicted of one count of theft by servant for 24 months with hard labour by the magistrate court of the first class presided over by Magistrate K. Mulife and that on 2nd February, 2012 his application for bail was denied. The applicant further deposed that he has since lodged a notice of appeal against the said conviction and sentence and he exhibited "DM 2", a copy of the same. He deposed further that he had been advised by his advocates that the offence for he has been convicted is bailable and that he verily believes that his pending appeal before the High Court is highly meritorious and has very high prospects of success and that unless this court grants him bail pending appeal, he was likely to serve the entire sentence and that his appeal would then be rendered nugatory and a mere academic exercise and further that he would suffer grave injustice and irreparable loss and damages as a result thereof. The said Delnesa Melaku stated that he is not a flight risk and that he is

able and willing to meet bail conditions should the court grant him bail pending appeal.

In the skeleton arguments filed on 9th March, 2012, to support the application, Counsel for the applicant, Mr. Linus Eyaa submitted that the High Court has power and the discretion to grant bail in all cases including those relating to persons accused of murder and treason, subject to the rule that such persons are rarely admitted to bail and he relied on the case of **OLIVER JOHN IRWIN v THE PEOPLE**¹. He further submitted that in order to grant the appellant bail pending appeal, the appellant is required to fulfil one of the following conditions laid down in the earlier cited case and also in the case of **MALIOTI KATENGA JAM v THE PEOPLE**² and **ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE 36th Edition**, paragraph 208-9 and which conditions include *inter alia*:

“(i) The likelihood of success of the appeal

(ii) The nature of the accusation against the applicant and the severity of the punishment which may be imposed

(iii) The nature of evidence in support of the charge

(iv) The independence of the sureties if bail were to be granted

(v) The prejudice to the applicant if he is admitted to bail

(vi) The prejudice to the State if bail is granted”

Counsel for the applicant submitted further that for bail pending appeal to be granted, the court must be satisfied that there are exceptional circumstances that are disclosed in the application. Mr. Eyaa argued that the fact that the appellant, due to delay in determining his appeal, may have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. He referred to the case of **KAYUMBA v THE PEOPLE**³ where the appellant was sentenced to two years imprisonment and that was considered a short period and that by the time his appeal was heard, he would have served his sentence, hence his admission to bail pending appeal. Mr. Eyaa likened that case to the present one and submitted that the appellant was also convicted and sentenced to two years imprisonment which should be considered a short period of which a substantial period could be served by the time the appeal is heard. Counsel for the applicant, therefore, urged the court to grant the application sought.

Mrs. M. K. Chitundu, Assistant Senior State Advocate objected to the applicant being granted bail pending appeal on the basis that a convicted person must not be granted bail

pending appeal unless he shows exceptional circumstances why such bail must be granted. She argued that contrary to senior Counsel for the applicant's submission that the likelihood of success of the appeal should be dealt with at the appeal stage, it was the respondent's submission that the likelihood of success of the applicant's appeal is one of the main reasons the court should consider in granting bail pending appeal as has been reflected in the applicant's skeleton arguments. She submitted further that a perusal of the applicants grounds of appeal and echoing the learned trial magistrate's sentiments, it is the respondent's submission that this appeal has no likelihood of success and that, therefore, it cannot be said to be an exceptional circumstance.

Mrs. Chitundu's reaction to the two years sentence was that the period of two years is long and that it is unlikely that the appeal would take two years before it is heard. She further invited the court to take judicial notice of the fact that nowadays appeals do not take long to be processed and heard in the High Court unless the record is extremely voluminous.

Further, with respect to Counsel for the applicant's submission that the applicant is not a flight risk, the learned Assistant Senior State Advocate submitted that as senior Counsel rightly observed, the applicant is a foreign national of Ethiopian origin and she submitted that he is a flight risk who might not come to prosecute his appeal, especially since in his affidavit he

deposed that he regularly resides at Flat No. B, Plot 14A, Kilimanjaro Road Makeni in Lusaka, which could be interpreted that he does not ordinarily or permanently reside there. She argued that he is a flight risk and that he might prejudice the State if he fails to come and prosecute his appeal. She, accordingly, urged the court not to grant the applicant bail pending appeal and she concluded by submitting that no exceptional circumstances had been disclosed.

In reply, Mr. Eyaa argued that the applicant had indicated the likelihood of success of his appeal in the grounds of appeal filed and that by the Assistant Senior State Advocate submitting that there is no likelihood of success, it is like predetermining the appeal. He submitted that the applicant in paragraph 9 stated that he verily believes that his appeal is meritorious and has a likelihood of success. Counsel for the applicant submitted further that section 332 (1) of the Criminal Procedure Code, Cap 88 of the Laws of Zambia, gives the court discretionary powers to grant bail so long as there are exceptional circumstances. He argued that they had shown the court that a two years sentence is a short period and that if bail is not granted, the convict would have served a substantial part of his sentence, so that if the appeal succeeds, the applicant would have been prejudiced.

With regard to the issue of the applicant being a flight risk, Counsel for the applicant reiterated that the applicant is not a

flight risk. He submitted that the interpretation of “*regularly reside*” should not be interpreted as the applicant not being of fixed abode as Flat No. B, Plot 14a, Kalimanjaro Road, Makeni is where his family resides at the rented premises. Mr. Eyaa submitted further that as indicated in the charge sheet on the record, the applicant is employed in Zambia at Oriental Quarries as Risk Manager. He further submitted that the applicant has sureties who are Zambians and who will ensure that he does not abscond from the court’s jurisdiction and he added that the applicant had been in Zambia for more than ten years. Counsel for the applicant submitted further that the State’s interest would be best taken care of by the court imposing strict conditions of bail and he prayed to the court to exercise its discretionary powers in the applicant’s favour by granting him bail pending appeal.

I have carefully considered the applicant’s application for bail pending appeal and all the submissions and authorities cited. As Counsel have properly submitted, the offence of theft by servant for which he was convicted and sentenced to two years imprisonment with hard labour is aailable offence. However, in applications for bail pending appeal as Counsel have also rightly observed, there are other considerations that have to be taken into account. One of the reasons that the applicant has given as an exceptional circumstance is that by the time the appeal is heard, he would have served a substantial part of the sentence of two years and that he is likely to be prejudiced if that happens

and his appeal succeeds and he relied on the decisions in the cases cited earlier and particularly the **KAYUMBA** case where the application for bail pending appeal was granted based on the two years period which was considered to be a short period.

I also considered the learned Assistant Senior State Advocate's invitation for this court to take judicial notice that lately appeals do not take long to be heard in the High Court unless the record is voluminous and takes long to be processed and I also wish to confirm that her observation is correct. However, be that as it may, as I earlier observed the offence that the applicant was convicted for is a bailable offence but the only concern that I have is the one expressed by the State and that is of the applicant being a possible flight risk. The applicant is a foreigner who has not even produced evidence of his ties to this country or reason for him to continue to have ties to this country. This regular residence at Flat No. B, Plot 14A, Kilimanjaro Road, Makeni in Lusaka has been identified as a rented residence but there has been no proof of such regular residence in the form of a lease agreement. Further, the proof of the applicant's residence of ten years in Zambia has not been presented to support his claim. Much as I would have wanted to exercise the court's discretionary power in the applicant's favour by granting him the bail pending appeal sought, I feel constrained by the State's apprehension of the applicant being a possible flight risk. In the circumstances therefore, I am inclined to decline and I do hereby

decline to grant the application for bail pending appeal to the applicant herein. Leave to appeal to Supreme Court is granted.

Dated this.....day of April, 2012

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F. M. Lengalenga

JUDGE