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

HPBA/35/2015



BETWEEN

MAX MAPONGA

APPLICANT

AND

THE PEOPLE

RESPONDENT

***Before the Honourable. Mrs. Justice M.C. Kombe in Chambers
this 9th day of November 2015.***

For the Applicant : In Person

*For the People : Mrs. M.P. Lungu and Ms. E. Mulele -State
Advocates, National Prosecution Authority.*

RULING

Cases referred to:

- 1. The People v Yusuf Pandoor (2010) 2 Z.R 206.**
- 2. Ngalasa Ngalasa v The People HPBA/04/2015 (Unreported).**
- 3. Titus Zulu & Another v The People (2010) 1. Z.R 450**

4. **Kayumba v The People SCZ/9/77/2011 (unreported).**

5. **Anuj Kumar Rathi Krishman v The People (2011) 3. Z.R 1.**

Legislation referred to:

1. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

This is a Ruling on an application for bail pending appeal made by the Applicant **MAX MAPONGA**, a Zimbabwean national.

The Applicant filed an affidavit dated 14th October, 2015 wherein he deposed that he appeared before the Subordinate Court charged with an offence of Theft of Goods in Transit contrary to Section 276 of the Penal Code Chapter 87 of the Laws of Zambia; that he was convicted of the same offence and subsequently sentenced to a jail term of two (2) years imprisonment with hard labour with effect from 1st September, 2015; that he filed a Notice of Appeal in the High Court against conviction and sentence on 3rd September 2015; that he appeared before the trial magistrate for an application for bail pending appeal on the 25th September 2015 which application was denied. The Applicant exhibited copies of the charge sheet and

the Notice of Appeal against conviction and/or sentence which were marked as '**MM1**' and '**MM2**' respectively.

The affidavit revealed that the offence for which he was convicted was bailable; that he was of fixed abode and capable of raising traceable sureties and that he was ready to abide by any conditions that this Court may set as he demonstrated punctuality and reliability during trial; that he believed his appeal had merit and had a high likelihood to succeed in the High Court and that if he remained in custody by the time the Court would be sitting for his appeal, he would have served a substantial part of the sentence hence rendering the appeal nugatory and an academic exercise. He therefore craved the indulgence of the Court to consider admitting him to bail pending appeal.

The Respondent opposed the application and filed an affidavit in opposition on the 3rd November 2015, deposed to by **MERCY PONDAMALI LUNGU**, a State Advocate at National Prosecution Authority. She deposed that the Applicant was convicted and sentenced to two (2) years imprisonment with hard labour for the offence of Theft of Goods in Transit; that none of the reasons stated

in the Applicant's affidavit in support disclosed exceptional circumstances warranting him to be admitted to bail pending appeal; that currently appeals were being heard within a reasonable time, therefore, it was highly unlikely that the Applicant would serve a substantial part of his sentence by the time the appeal would be heard.

The Applicant filed an affidavit in reply on 6th November, 2015. In his affidavit in reply, the Applicant deposed that he understood bail was a Constitutional right of any person in the country; that the offence of which he was convicted wasailable; that he had a strong belief that his appeal would succeed; that he had been in custody for two (2) months and that his record was not the only one to be processed for appeal; that it might take more than two months for the record to be processed.

When the matter came up on 6th November, 2015, the Applicant merely relied on his affidavit in support and reply filed into Court and restated the facts therein. He urged this Court to dismiss the State's opposition and grant him bail pending appeal.

Learned Counsel for the State Ms. E. Mulele informed the Court that she was relying on the affidavit in opposition filed into Court on 3rd November, 2015.

She submitted that having perused through the contents of the Applicant's affidavit in support the Applicant had not disclosed cogent reasons as to why bail pending appeal should be granted.

Learned Counsel cited the case of *The People v Yusuf Pandoor* ⁽¹⁾ where the Supreme Court outlined the circumstances under which bail pending appeal was granted. These circumstances are:

- 1. Where the applicant seeks to appeal on a strong point of law;**
- 2. Where the Applicant feels he would have served a substantial portion of his sentence by the time the appeal is heard.**

Ms. Mulele submitted that although the Court was not faced with the obligation of delving into the merits of the Applicant's appeal, the Applicant should at least on the face of the appeal demonstrate sound reasons as to why the appeal should succeed.

With regard to serving a substantial portion of the sentence before the appeal was heard, Counsel argued that the Applicant had not

displayed as a matter of fact that his appeal would delay in being heard. Counsel further urged this Court to adopt the view earlier taken in the case of **Ngalasa Ngalasa v The People** ⁽²⁾ in which this Court ruled at page 8 that appeals were being heard expeditiously and the Applicant's application for bail pending appeal could not be granted on the basis that he would have served a substantial portion of his sentence by the time the appeal was heard.

It was further submitted that as it stood, the Applicant was a convict and the judgment passed by the Court below was a sound judgment until it was quashed by the Appellant Court. Counsel submitted that it was for this reason that the bail pending appeal should be granted with reserve.

Ms. Mulele further submitted that the reason given by the Applicant that he was punctual, reliable and of fixed abode did not fall within the circumstances pronounced by the Supreme Court in the above cited authorities.

In reply to the State's submission, the Applicant reiterated his earlier position and added that even if he served two months or one

week, bail was his right and should be granted. It was his submission that life in prison was pitiable due to congestion and further that the offence for which he was convicted was a bailable offence.

I have carefully considered this application for bail pending appeal, the affidavit evidence before me and the parties' submissions and the authorities cited.

It is trite law that this Court is clothed with the power and discretion to grant bail pending appeal. However in the case of

Titus Zulu, Mike Musanya Sambondu v The People⁽³⁾, Matibini J stated that:

“Unlike bail pending trial, bail pending appeal is granted with the reserve because the applicant is a convicted person and the conviction is good unless and until the appellate Court quashes the conviction. It is for this reason that different considerations apply in applications for bail pending appeal”

In view of the above observation made by Matibini J, there are certain conditions which have to be fulfilled by an applicant before

the Court can grant bail pending appeal. These conditions include *inter alia*:

- 1. The likelihood of success of the appeal;**
- 2. The nature of the accusation against the applicant and the severity of the punishment which may be imposed;**
- 3. The nature of the evidence in support of charge;**
- 4. The independence of the sureties if bail were to be granted; and**
- 5. The prejudice to the State if the bail is granted.**

Further for bail pending appeal to be granted, the Court must be satisfied that there are exceptional circumstances that have been disclosed in the application. This was the holding of the Supreme Court in **Anuj Rathi Krishman v The People**⁽⁴⁾ where the Supreme Court held *inter alia* 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 **Kayumba v The People**⁽⁵⁾, bail pending appeal was granted to the Applicant on the ground that a sentence of two (2) years

imprisonment was considered too short such that by the time the appeal was going to be heard, the Appellant would have served a substantial part of the sentence.

In the present case, the Applicant has advanced various reasons why he believes this Court should grant him bail pending appeal.

The Applicant has argued that the offence he was convicted of is bailable and that the sentence of two (2) years is too short such that he is likely to serve a substantial part of it by the time his appeal is heard in the High Court. I agree with the Applicant that the offence with which he was charged and convicted is indeed a bailable one. However, I should state from the outset that bail pending appeal is not granted as a matter of right as argued by the Applicant. As the Supreme Court stated in the case of **Rathi Krishna** which I have referred to above, in an application for bail pending appeal, the Court is dealing with a convict and sufficient reasons must exist before such a convict can be released on bail pending appeal.

Therefore notwithstanding the fact that the offence with which the Applicant was charged and convicted is bailable, the Applicant is

now a convict and I have to consider if there are sufficient reasons warranting this Court to release him on bail pending appeal.

The Applicant seems to rely on the two (2) year sentence as an exceptional circumstance. Although the Supreme Court in the **Kayumba** case stated that serving a substantial part of the sentence by the time the appeal is heard due to delay in determining the appeal is a factor to be considered in an application for bail pending appeal, the Supreme Court considered the **Kayumba** case in the **Rathi Krishnan** case and stated that each case is considered on its merits depending on what may be presented as exceptional circumstances. If the record of appeal is voluminous and could take months to prepare, this can be considered as an exceptional circumstance.

I have perused the case record from the Court below. Although the Applicant was sentenced to twenty-four (24) months imprisonment, there is no evidence to suggest that there will be a delay in determining this appeal. The case record is not voluminous to warrant any unjust delays as evidence was adduced from five (5) Prosecution witnesses whose evidence was not lengthy. In my view,

it will not take months to prepare the record. Furthermore, I have taken judicial notice of the fact that appeals are being heard every month therefore they are being heard relatively expeditiously. In this regard, I do not accept the Applicant's argument that there is a serious backlog of records yet to be processed which cannot be ignored.

In view of the foregoing, I find that it is not likely that the Applicant would have served a substantial part of the sentence before the appeal is heard.

The Applicant has also argued that his appeal is meritorious and likely to succeed. He has exhibited a Notice of Appeal against conviction and sentence wherein he has laid down the grounds of appeal. In considering this aspect, I take cognizant of the holding of Matibini J in **The People v Yousuf Pandor and Bengula Beyani** where he held:

“The exceptional or unusual circumstance include: where an appeal has raised an important or difficult point of law; where there is real doubt about the correctness of a conviction on a point of law; where a sentence is manifestly contestable as to whether or not it is a sentence known to law; where the

appellant is likely to serve the entire or substantial part of the sentence before the appeal is heard and where generally there is likelihood of success.

I have considered the grounds of appeal as indicated in exhibit “MM2”. I have further perused the proceedings in the Court below. Without necessarily pre-empting the outcome of the appeal, the Applicant has not raised any important or difficult points of law about the correctness of the conviction. Therefore, I am not satisfied that the appeal is likely to succeed.

The other reasons advanced by the Applicant are that he is of fixed abode and capable of raising traceable sureties and that he demonstrated punctuality and reliability during trial.

The Supreme Court in the ***Rathi Krishnan*** case held that:

‘The fact that an applicant did not breach the bail conditions in the court below is not an exceptional circumstance which can warrant admitting an applicant to bail pending appeal.’

The holding in the above case is very clear. The Applicant cannot rely on the fact that he demonstrated punctuality and reliability during trial as a reason to be admitted to bail. The Applicant has

not adduced evidence of his ties to this country and there is a likelihood of him being a flight risk.

For the above reasons, I find that the Applicant has not disclosed exceptional circumstances warranting the grant of bail pending appeal. Accordingly, the application is dismissed.

Leave to appeal granted.

Delivered at Lusaka this 9th day of November 2015



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M. C. KOMBE
JUDGE