

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

HPBA/23/2016

*Wif*

**BETWEEN:**

**MOSES MOTOVU OKOLO**

**AND**

**THE PEOPLE**



**APPLICANT**

**RESPONDENT**

**Before the Honourable Mrs. Justice M. C. Kombe this 8<sup>th</sup> day of August, 2016**

*For the Applicant* : *In person*

*For the People* : *Mrs. A. K. Mwanza - State Advocate from National Prosecution Authority (N.P.A).*

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## **R U L I N G**

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**Cases referred to:**

1. *Stoddart v The Queen* (1949-1954) NRLR 288.
2. *Steven Masumba v The People* -SCZ/8/234/2014 (Unreported).
3. *Titus Zulu Mike Musanya Sambundu v The People* (2010) 1 ZR 450.
4. *Anuj Kumar Rathi Krishnan v The People* (2011) 3 ZR 1.
5. *Kayumba v The People*- SCZ/9/77/2011 (Unreported).

**Legislation referred to:**

1. *The Criminal Procedure Code (CPC), Chapter 88 of the Laws of Zambia.*

This is a Ruling on the Applicant's application for bail pending appeal. The application is made pursuant to Section 321 (1) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia and it is supported by an affidavit deposed to by the Applicant **MOSES MATOVU OKOLO**.

In his affidavit, the Applicant explained that he stood charged with an offence of being Found in Possession of Counterfeit Notes with Intent to Utter contrary to Section 370 (a) of the Penal Code Chapter 87 of the Laws of Zambia; that upon being tried, he was found guilty and subsequently was convicted and imprisoned to a term of 18 months with hard labour with effect from 27<sup>th</sup> June, 2016; that having not been satisfied with the findings and sentence of the court, he filed the Notice of Appeal to the High Court. The Notice was produced and marked as **'MMO2'**.

He further explained that his application for bail pending appeal was rejected by the trial magistrate and that he was now applying for bail before this court. A copy of the Order was marked as **'MMO3'**; that he was of fixed abode and was able to provide reliable sureties who were also of fixed abode and in permanent employment with recognized institutions; that he would abide by any Order or directive of this court; that he felt his appeal was likely to take long to be heard by the High Court and by the time his appeal would be heard, he would have served a substantial part of the sentence or the whole sentence rendering his appeal a mere academic exercise.

At the hearing of the Applicant's application on 29<sup>th</sup> July, 2016, the Applicant informed the court that he was relying on his summons and affidavit in support and that the reasons for his application were reflected in his affidavit. The Applicant also clarified to the court that he is not a Zambian National as indicated in his affidavit but a Ugandan National and that he had only been in Zambia for one and half years.

On behalf of the Respondent, learned State Advocate Mrs. Mwanza informed the court that she was opposing the application although no affidavit in opposition had been filed.

In her submissions, Mrs. Mwanza relied on the case of *Stoddart v Queen* <sup>(1)</sup> and stated that this case was instructive regarding the principles to be applied when considering an application for bail pending appeal. She submitted that it was clear from the case cited that there had to be exceptional circumstances to warrant the granting of bail pending appeal.

Mrs. Mwanza submitted that given the facts of the case, there were no special circumstances which were peculiar to the Applicant that would render this court to grant bail; that the reasons advanced by the Applicant that 18 months was too short a time and that by the time his appeal would be heard he would have served a substantial part of the sentence was not cogent as they believed that the Applicant's appeal would be heard on time. In aid of this argument, Mrs. Mwanza referred the court to the case of *Steven Masumba v The People*<sup>(2)</sup> wherein it was stated that:

***“There is no longer a backlog with criminal appeals and that the court is up to date with criminal appeals.”***

It was also Mrs. Mwanza's submission that with the information that the Applicant was a foreign national who had been in the country for one and half years, they believed that he was a flight risk.

Further, it was argued that if the Applicant failed to abide by his bail conditions, the State stood to be greatly prejudiced as it would be unable to prosecute the case against the Applicant.

In furtherance of her submissions opposing the application, Mrs. Mwanza relied on the case of *Titus Zulu v The People*<sup>(3)</sup> wherein it was stated that with bail pending appeal, the court was dealing with a convict and therefore sufficient reasons had to exist before a convict could be released on bail.

In the premises, it was her prayer that this court dismisses the Applicant's application.

In reply, the Applicant submitted that he had been granted bail in the Subordinate court and they continued with the case before that court; that he was convicted because he was not able to bring evidence before that court and that he had been misled by his co-accused; that he felt he had a right to be granted bail pending appeal so that he could bring other evidence which he was not able to bring before the subordinate court to enable him prove his innocence.

He therefore appealed to this court to grant him bail.

Those were the submissions by both parties which I have carefully considered.

By this application, I have to determine whether the Applicant is entitled to bail pending appeal. Bail pending appeal is provided for under Section 332 (1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia and not Section 321 (1) which has been cited by the Applicant. Section 332 (1) reads as follows:

***'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.'***

This provision has clothed the Court with the discretion to grant bail pending an appeal. Thus in the case of ***Titus Zulu, Mike Musanya Samboudu v The People*** a case cited by the State, Matibini J. stated that:

***'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. It is for this reason that different considerations apply in applications for bail pending appeal.'***

Therefore, for bail pending appeal to be granted, the court must be satisfied that there are exceptional circumstances disclosed in the application. This was the holding of the Supreme Court in the ***Stoddart case*** which was cited by counsel for the Respondent. Further, in the case of ***Anuj Kumar Rathi Krishnan v The People*** <sup>(4)</sup> 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 the present case, the Applicant has stated that he is of fixed abode and he is able to provide reliable sureties who are also of fixed abode and in permanent employment with recognized institutions. When determining an application of this nature, I am of the considered view that this is not an exceptional reason to warrant this court to grant bail pending appeal. In any case, the Applicant has not adduced evidence to support his assertion.

The only evidence before this court is that the Applicant is a foreign national and has only been in this country for a period of one and half years. However, he has not indicated to this court what the purpose of his visit to Zambia was for and therefore, there is no indication that he has any connection to this country to rule out the possibility of him being a flight risk. In addition, the trial magistrate dismissed the Applicant's application for bail pending appeal as he considered him to be a flight risk since he had failed to appear before that court for judgment on at least two (2) occasions.

In view of the foregoing, I find that there are reasonable grounds on which it can be inferred that the Applicant may be a flight risk and therefore, he might not be able to prosecute this appeal. If the appeal is not prosecuted, the State stands to be greatly prejudiced since the Applicant is a convict.

Another reason advanced by the Applicant is that he feels his appeal is likely to take long to be heard by the High Court and that by the time it is heard, he would have served a substantial part of the sentence or indeed the whole sentence therefore rendering the appeal a mere academic exercise.

When considering this reason, I am guided by the holding of the Supreme Court in the case of **Anuj Kumar Rathi Krishnan**, wherein it 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.

However, the Court considered the case of **Kayumba v The People (5)** in the **Krishnan case** and stated that each case was to be considered on its merits depending on what was presented as exceptional circumstances. For example, if the record of appeal was voluminous and could take months to prepare, this could be considered an exceptional circumstance.

I have considered the circumstances surrounding this case having perused the case record from the Court below. Although the Applicant was sentenced to 18 months imprisonment, there is no evidence to suggest that there will be a delay in determining the appeal. The case record is not voluminous and in my view it cannot take months to prepare.

Further, I have taken judicial notice of the fact that appeals are being heard relatively expeditiously as they are cause- listed every month to be heard before the High Court. In this regard, it is not likely that the Applicant would have served a substantial part of the sentence before the appeal is heard. I therefore

accept the submissions by Mrs. Mwanza and I find that the reason advanced by the Applicant that he would have served a substantial part of the sentence before his appeal is heard is not cogent.

The Applicant has also argued that it is his right to be granted bail pending appeal. As counsel for the Respondent has rightfully observed, bail pending appeal is not a right for the Applicant since he is a convicted person. As the Supreme Court guided in the case **Anuj Kumar Rathi**, special reasons must exist before such a convict can be released on bail.

The reason advanced by the Applicant that he should be given an opportunity to collect evidence which he failed to adduce before the Subordinate Court in my view is not a special reason. I say so because when the Applicant was appearing before the Subordinate Court, he was on bail and therefore he should have used that opportunity to gather evidence to adduce before that court. I also wish to point out that when an appellate court is hearing an appeal, no evidence is adduced as the court relies on the evidence on record adduced in the lower court.

For the foregoing reasons, I find that, on the facts of this case and the evidence adduced, this is not a proper case in which I can exercise my discretion to grant bail pending appeal as the Applicant has not disclosed any exceptional circumstances warranting the granting of bail pending appeal. Accordingly, the application is dismissed.

Leave to appeal is granted.

**Delivered at Lusaka this 8<sup>th</sup> day of August, 2016**



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**M. C. KOMBE**  
**JUDGE**