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IN THE SUPREME COURT OF ZAMBIASCZ JUDGMENT NO. 18 OF 2009HOLDEN AT LUSAKAAPPEAL NO. 83 OF 2009

(Criminal Jurisdiction)

B E T W E E N:

XAVIER FRANKLINE CHUNGUAPPELLANT**-VS-****THE PEOPLE**RESPONDENT

For Appellant: Mrs. D. Ng'ambi of Messrs Nyankhata Chambers

For Respondent: Mr. M. Nchito, Counsel for Prosecution, Taskforce on
Corruption

R U L I N G

CHITENGI, JS, delivered the Ruling of the Court.Cases referred to:

1. Malyoti Katenga Jamu (1981) ZR 1999.
2. Rosemary Chilufya -Vs- The People (1986) ZR 32.

Statutes referred to:

1. Supreme Court of Zambia and Chapter 25 of the Laws of Zambia: Section 22(1).
2. Criminal Procedure Code Chapter 88 of the Laws of Zambia: Section 336.

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On the 25th June, 2009, the applicant, Xavier Frankline Chungu, both filed a notice of appeal and took out a summons to admit to bail. The summons which is supported by an affidavit is pursuant to Section 123 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia and paragraph 3-11 of Archibold Criminal Pleading 2005 Edition. The notice of appeal is accompanied by grounds of appeal and skeleton arguments.

In arguing this matter, Mrs. Ng'ambi, learned counsel for the applicant, pointed out in the fore front of her submissions that the proceedings are an appeal against the refusal by the High Court to grant the applicant bail pending trial. However, when properly looked at and as Mr. Nchito learned counsel for the defendant adumbrated in his submissions, this matter cannot be an appeal. It is a renewal of the application for bail.

Briefly stated for the purpose of this application, the facts of this case are that the applicant who, from his own affidavit is facing 169 criminal charges, was granted bail some four or five years ago. The applicant jumped the bail and remained at large for four years or so but of his own volition returned to Zambia and he was recaptured. The applicant applied for bail before the Subordinate Court but the learned trial Magistrate refused the applicant bail. Further applications to the High Court were also rejected by the learned High Court Judges. Hence the application to this court.

Counsel's arguments and submissions before me centre on the issue whether on the facts of this case the applicant is or is not entitled to bail pending trial. But that is not the critical issue in this application. The critical issue in this application is whether the Supreme Court has jurisdiction to grant bail pending

trial to an accused person who is appearing before the Subordinate Court or the High Court awaiting trial. Mrs. Ng'ambi, learned counsel for the applicant cited the case of Malyoti Katenga Jamu ⁽¹⁾ as authority for the statement that the Supreme Court may admit the applicant to bail where the High Court has refused the applicant bail. Properly read the case of **Jamu** ⁽¹⁾ is not authority for the proposition that the Supreme Court has power to grant bail pending trial where the trial court has refused the applicant bail pending trial. In the **Jamu** case ⁽¹⁾ the applicant had been convicted by the court below. In this case the applicant is not a convict.

An application for bail to the Supreme Court can only be competent if it is an application for bail pending appeal. Provisions relating to application for bail to the Supreme Court are found in Section 22 (1) of the Supreme Court of Zambia Act (1). Section 22 (1) reads:-

"22 (1) Where the High Court has, in exercise of its powers under Section three hundred and thirty-six of the Criminal Procedure, refused to admit an applicant to bail or to postpone the payment of any fine imposed upon him, the court may, if it deems fit, on the application of the applicant, and pending determination of his appeal or application for leave to appeal to the court in a criminal matter-

(a) Admit the appellant to bail, or if it does not so admit him, direct him to be treated as an un-convicted prisoner pending the determination of his appeal or of his application for leave to appeal, as the case may be; and

(b) Postpone the payment of any fine imposed upon him."

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It can be seen from these provisions that for the Supreme Court to be clothed with the jurisdiction to grant bail two conditions must be present. Firstly, the High Court should have exercised its powers under Section 336 of the Criminal Procedure Code (2) and refused the application for bail. Secondly the applicant must be an appellant whose appeal is pending for determination before the Supreme Court: Rosemary Chilufya -Vs- The People.⁽²⁾ The two conditions I have stated above are not present in this application. The applicant in this application has not been convicted of any of the offences with which he is charged and is not an appellant in any appeal.

Therefore, in terms of section 22 of the Supreme Court Act of Zambia (1) this court has no jurisdiction to grant the applicant bail pending trial. In the event, this application is misconceived and it is accordingly refused.

Delivered in Chambers at Lusaka this 16th Day of July, 2009.



Peter Chitengi

JUDGE OF THE SUPREME COURT