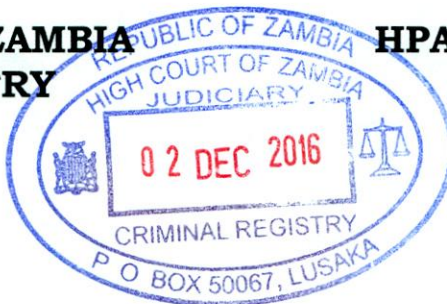


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)



HPA/19/2016

B E T W E E N :

FLORENCE NAMUKONDA

APPLICANT

AND

THE PEOPLE

RESPONDENT

Before the Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on 2nd December, 2016

For the Applicant : *Mr. K Muzenga, Deputy Director, Legal Aid Board*

For the Respondent : *Mrs. S.C. Kachaka, Senior State Advocate,
National Prosecution Authority*

R U L I N G

Case Authorities Referred To:

1. *Anuj Kumar Rathi Krishnan v The People SCZ Appeal No. 19 of 2011*
2. *Dr. Kashiwa Bulaya v The People SCZ/9/01/2009*

Legislation referred to:

1. *Criminal Procedure Code, Chapter 88*
2. *Prisons Act, Chapter 97*

This is an application for bail pending appeal. It was filed pursuant to section 332(1) of the Criminal Procedure Code. It is supported by an Affidavit.

The history of this application is that the Applicant **Florence Namukonda** appeared before the Subordinate Court charged with the offence of theft contrary to Section 272 of the Penal Code. The particulars of the offence alleged that on 26th June, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia the Appellant stole cash amounting to KR109,350.00 (US\$20,250) the property of Remezo Emeline. The Appellant was convicted and sentenced to three years simple imprisonment.

The Applicant appealed her conviction and sentence before this Court. This Court upheld the conviction and sentence of the lower Court on 25th November, 2016. The Applicant dissatisfied with the decision of this Court, filed a Notice of Intention to Appeal on 28th November, 2016. As a consequence, the Applicant has made an application to this Court for admission to bail pending appeal.

The Affidavit in Support deposed to by the Applicant discloses that on 25th November, 2016, the Applicant was convicted of the offence of Theft contrary to section 272 of the Penal Code, in which she was sentenced to three years simple imprisonment.

The Affidavit also discloses that being dissatisfied with the conviction and sentence imposed by the Subordinate Court, the Applicant lodged an appeal before this Court, which was dismissed, while granting the Applicant leave to appeal.

The deponent states that she has lodged an appeal against conviction and sentence to the Court of Appeal. This is shown in the exhibit marked "**FN1**". The deponent further states that her appeal to the Court of Appeal has a likelihood of success, granted the grounds stated in the Notice of Intention to Appeal.

The deponent avers that she has a serious medical attention in that she suffers from terrible high blood pressure (BP), Tuberculosis and chronic lower back pain. As a result, her continued incarceration may be fatal and injurious to her life. This is shown in the exhibit marked "**FN2a-h**".

The deponent states that she is employed by the Ministry of Education as a teacher and is therefore not a flight risk. Further, that during the course of her appeal before this Court, she was on bail. The deponent also states that she is able to provide credible Zambian working sureties and to abide by any other conditions that the Court may impose as part of the bail conditions if granted.

The matter came up for hearing on 1st December, 2016. Both parties were in attendance, although Learned Counsel for the Appellant, who was appearing before my brother M. Siavwapa, J, walked in 15 minutes late. Learned Counsel for the Respondent Mrs. S.C. Kachaka told the Court that the respondent was only served Summons and Affidavit in Support of the Application for Admission for Bail Pending Appeal in the afternoon of 30th November, 2016. As a result, the Respondent was unable to file an Affidavit in Opposition but would oppose the application on points of law.

In opposing the application, Learned Counsel for the Respondent submitted that the Affidavit in Support did not disclose any exceptional circumstances for the Court to grant the applicant

for bail pending appeal. She cited the case of **Anuj Kumar Rathi Krishnan v The People**¹ where the Supreme Court stated that before a Court can grant bail, it must be satisfied that there are exceptional circumstances. Two of such circumstances being that:

- a) the applicant is likely to serve a substantial part of the sentence before the appeal is heard; and
- b) there is a likelihood of the appeal succeeding.

In relation to (a) above, she argued that it was a notorious fact that appeals were usually disposed off very efficiently and as such the Appellant was unlikely to serve a substantial part of her sentence. On (b) regarding the likelihood of the appeal succeeding, Counsel submitted that though it was the preserve of the Court to determine the likelihood of success, her view was that the applicant's appeal was unlikely to succeed.

Learned Counsel contended that the Applicant's ill-health was not a special circumstance for granting her bail. She called in aid the case of **Dr. Kashiwa Bulaya Vs. The People**² where the Supreme

Court held that ill-health is not a special circumstance upon which a prisoner can be granted bail pending appeal.

She also referred me to section 71(1) of the Prisons Act which allows a prisoner to under-go medical examination treatment. It provides that:

"In the case of the serious illness of a prisoner, an officer in charge, on the advice of the medical officer, may make an order for the removal of the prisoner to hospital:

Provided that in cases of emergency, or in the absence of the medical officer, the removal of the prisoner may be ordered by the officer in charge without being so advised by the medical officer."

Learned Counsel contended that the exhibits shown in the Affidavit in Support were old. She pointed out that the admission to sick list was issued on 3rd September, 2016, and from that time the Applicant must have recovered. Further, the Applicant's medical condition of Tuberculosis issued in 2008 for a curable disease, is one which the Applicant must have recovered from.

Learned Counsel further contended that the fact that the Applicant was on bail during the course of her appeal in this Court does not entitle her to bail pending appeal. She drew my attention

to the case of **Anuj Kumar Rathi**¹ where the Supreme Court 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 to admit an applicant to bail pending appeal".

All in all, Learned Counsel argued that there were no exceptional circumstances to warrant the convict bail pending appeal. She urged the Court to dismiss the application on the ground that it lacked merit.

In rejoinder, Learned Counsel for the Applicant submitted that the Affidavit in Support disclosed exceptional circumstances in which the Court could grant the application. He argued that the list of exceptional circumstances was not exhaustive. On the likelihood of the appeal succeeding, Learned Counsel contended that the Applicant was not required to show that the appeal would succeed rather the obligation was to show in the grounds of appeal that the Appellant had raised an arguable case.

Counsel contended that the other exceptional circumstance which had been shown was that the Appellant was likely to serve the whole or substantial part of the sentence by the time the appeal

is heard and determined. He further contended that generally appeals took long to be heard. Considering that the Applicant would be entitled to one year remission on sentence, and thereby in effect serving a two year sentence, Counsel argued that by the time the record of appeal was prepared, submitted to the Court of Appeal, cause listed, heard and judgement delivered, a year would have elapsed. He argued that the time to prepare the record of appeal, its submission to the Court of Appeal, cause listing, the hearing and delivery of judgment could take up to a year.

Learned Counsel also argued that since the 1st session of the Court of Appeal was scheduled on 17th January, 2017, there was likelihood that the Applicant's appeal would not be heard on time. He submitted that the two circumstances of the likelihood of appeal succeeding and the period the Applicant is likely to stay in custody before her appeal is heard and determined constituted exceptional circumstances, in which the Court could grant her application to bail.

Learned Counsel also submitted that the Applicant did not pose any flight risk. She is a teacher who stands to lose a lot if

she is denied bail and her appeal allowed, in that her loss of benefits from her employment would not be compensated.

Learned Counsel argued that the Respondent will not be prejudiced in any way should the Court release the Applicant on bail because she will still serve the sentence to be meted on her from the time that she will be taken into custody.

Learned Counsel further argued that if the Applicant is not granted bail and her appeal is allowed, she would lose out the period she would have spent in custody and will have no recourse to a civil remedy, as her detention would have been lawful. He concluded with a prayer to the Court to grant the application for bail pending appeal in the interest of justice.

I have seriously considered this application together with the contents of the Affidavits filed herein and the oral submissions of Learned Counsels.

Section 332 (1) of the Criminal Procedure Code sets out thus:

"332. (1) 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..."

Let me state that bail pending appeal is ordinarily granted with reservation because the Applicant is a convicted person. Hence a conviction is good unless and until an appellent Court quashes it. Nevertheless, certain conditions must be fulfilled by an Applicant before a Court can grant bail pending appeal.

As rightfully submitted by both Learned Counsels, these *inter alia* include: the likelihood of success of the appeal; the likelihood that the Applicant would have served a substantial part of the sentence; the nature of the accusation against the Applicant and the severity of the punishment which may be imposed; the nature of the evidence in support of the charge; the independence of the sureties if bail were to be granted; and the prejudice to the State if the bail is granted.

In **Anuj Kumar Rathi**¹ 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 *casu* the Applicant argues that the offence she was convicted of is bailable. Further, the sentence of three (3) years is too short and by the time her appeal is heard by the Court of Appeal, there is likelihood that she would have served a substantial part of the sentence. I have no quarrel with the submission that the offence the Applicant was charged and convicted of is indeed a bailable one. However, I must emphasise that bail pending appeal is not granted as a matter of right.

An application for bail pending appeal must be considered on its merits depending on what have been presented as exceptional circumstances. The argument canvassed by the Applicant that her appeal is unlikely to be heard on time and that she may have served a substantial part of her sentence if not supported by the current process of the Court system. It is a notorious fact criminal cases take precedence in any Court and as a result thereof, her appeal is likely to be heard on time by the Court of Appeal.

The Applicant has argued that her appeal is meritorious and likely to succeed as exhibited in the Notice of Intention of Appeal dated 28th November, 2016. My perfunctory perusal of the grounds

of appeal shown in exhibit "**FN1**", without necessarily pre-empting the outcome of the appeal, reveal that the Applicant has not raised difficult points of law about the correctness of her conviction and sentence. Therefore, I am not satisfied that her appeal is likely to succeed.

The other reasons advanced by the Applicant that she is of poor health, a teacher in the Ministry of Education capable of providing traceable sureties and abiding by the bail conditions if granted, are not sufficient, in my considered view, to grant her bail pending appeal. As aptly stated by the Supreme Court in **Anuj Kumar Rathi**¹:

"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."

I also find that the mechanism for medical attention in section 71(2) of the Prisons Act is sufficient to attend to the poor health status of the Applicant.

I therefore decline to grant the Applicant bail pending appeal. Accordingly, I dismiss this application.

Leave to appeal is granted.

Delivered at Lusaka this 2nd day of December, 2016.



M. Mapani-Kawimbe
HIGH COURT JUDGE