

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

HPBA/11/2017



**IWELL KALEMBELEMBE
WILLIAM ZULU**

V

THE PEOPLE

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 5th DAY OF
JUNE, 2017**

For the Appellants : In person

For the Respondent : Mr Crispin Ngoma, State Advocate, NPA

R U L I N G

CASES REFERRED TO:

- 1. Malioti Katenga Jamu V The People 1981 ZR 99**
- 2. Oliver John Irwin V The People 1993-1994 ZR 7**
- 3. The People V Yusuf Pandor 2010 VOL 2 ZR 206**
- 4. Anuj Kumar Rathi Krishnan V The People 2011 VOL 3 ZR 1**
- 5. Sande Kayumba V The People SCZ/9/77/2011**

LEGISLATION AND OTHER WORKS REFERRED TO

- 1. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**
- 2. Archibold's Criminal Pleading, Evidence and Practice 36th edition**

This is a ruling on an application for bail pending appeal, made both appellants. The applications are supported by affidavits. At the hearing of the application A2 submitted that his family has faced hardship since his incarceration, as they depended on him as the bread winner, and that now his children are out school.

A1 on the other hand submitted that the grant of bail pending appeal is his constitutional right. He told the court that he is of fixed abode, and is therefore traceable. He also alluded to the hardships being faced by his family, following his arrest and subsequent conviction, highlighting that his wife does not work, and he has no relatives in Lusaka who can assist the family. That he has had no job since the arrest in 2013. He further submitted that if granted bail, he can raise credible sureties.

In response the State Advocate stated that bail pending appeal is granted at the court's discretion, and that in order that it may be granted, there must be exceptional circumstances. He named one the exceptional circumstances as the convict having served a substantial part of the sentence by the time the appeal is determined. That nowadays criminal appeals are disposed of quickly, and it is therefore unlikely that the appellants in this matter would have served a substantial part of their sentences, if they were not granted bail pending appeal.

He further submitted that the court in considering the application should take into account the fact that it is dealing with already convicted persons, hence the need to examine all the grounds brought forward in making the application.

A1 in reply stated that with regard to serving a substantial part of the sentence, he had been on police bond from 2013 to 2017, and that in itself was like serving a sentence, as he could not find any job as their portraits had been circulated in the media, and no one was willing to employ him.

I have considered the application. Section 332 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia provides that;

“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”.

From this provision it is clear that in order for any convict to be eligible for bail pending appeal, they must have entered an appeal. Further the section empowers the appellate court or the subordinate court that convicted or sentenced the person, to grant bail pending appeal.

From the record I note that the court that convicted and sentenced both convicts in this matter is based at Mansa, and the assumption is the court has since returned to Mansa. Therefore as the High Court, which is an appellate court, I have jurisdiction to hear the application. Thus the first question is whether the appellants have entered appeals in this matter?

There is on record notices of appeal filed by both convicts, thus the requirement has been met. Coming to the merits of the application, I note the gist is that A1 alleges that his appeal has prospects of success, and therefore as the two year imprisonment term that he has been condemned to, is short, he will have served the sentence by the time the appeal is heard, as appeals take long to be processed. The other arguments advanced relate to hardship by both convicts.

In the skeleton arguments and list of authorities filed by A1, reference is made to the cases of ***OLIVER JOHN IRWIN V THE PEOPLE 1993-1994 ZR 7, MALIOTI KATENGA JAMU V THE PEOPLE 1981 ZR 99*** as well as the book ***Archibold’s Criminal Pleading, Evidence and Practice 36th edition, paragraph 208-209*** where the conditions to be satisfied in order for bail pending appeal to be granted are laid down as;

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 the charge*
4. *The independence of the sureties if bail were to be granted*
5. *The prejudice to the applicant if he were to be admitted to bail*
6. *The prejudice to the state if the bail is granted.*

He argues that he has met the exceptional circumstances required to be met in order to be released on bail pending appeal. He further refers to the case of **SANDE KAYUMBA V THE PEOPLE SCZ/9/77/2011**, where the Supreme Court considered that a period of two years was short, and that by the time the appeal would have been heard, he would have served his sentence, and he was accordingly admitted to bail pending appeal.

Further reference is made to the case of **THE PEOPLE V YUSUF PANDOR 2010 VOL 2 ZR 206**, where the Supreme Court stated that bail pending appeal can be granted where the applicant seeks to appeal on a strong point of law, or where the applicant feels that he would have served a substantial portion of the sentence, by the time the appeal is being heard. That the grounds of appeal exhibited in this matter show that there is merit in the appeal, and therefore the application should succeed.

To this end reference is made to the case of **ANUJ KUMAR RATHI KRISHNAN V THE PEOPLE 2011 VOL 3 ZR 1** which held that *“it is not for the court to delve into the merits of each ground, but it suffices that all the grounds are examined, and a conclusion is made that prima facie, the prospects of success of the appeal are dim”*.

I have carefully considered the exceptional circumstances argued as entitling an applicant to be admitted to bail pending appeal. Crucial among these are the prospects of success of the appeal, and the applicant having served a substantial part of the sentence by the time the appeal is determined. I have also taken into account that my role at this stage is not to delve into the merits of success of the appeal, but rather to examine the grounds and make a conclusion prima facie, that the appeal is bound to fail.

A perusal of the record prima facie, reveals that the prospects of success of the appeal in this matter are slim and therefore in my view the fact that the convicts would have served a substantial part or the entire sentence in this matter is without consequence. On that basis I find that this is not a proper case for the applicants to be admitted to bail pending appeal, and the application accordingly fails.

DATED THE 5th DAY OF JUNE, 2017



S. KAUNDA NEWA
HIGH COURT JUDGE