

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

HPBA/13/2025

BETWEEN:

TREEGAIN RHODAH NGUNI KANSEMBE

APPLICANT

VS

THE PEOPLE

RESPONDENT

Before the Honourable Mrs. Justice R. Chibbabbuka on the 19th day of
May, 2025

For the Applicant: Messrs Mutemwa Chambers
For the Respondent: Anti-Corruption Commission

RULING

Cases referred to:

1. *Kingstone Makungu vs The People* CAZ/09/56/2017
2. *Collin Robert vs the People* CAZ Appeal No. 902 of 2024
3. *Weir Minerals Central Africa Limited vs Patrick Chisanga* Appeal No. 114/2022
4. *Phiri & Others vs The People* (1973) ZR 131
5. *Stoddard vs The Queen* (No. 1) N.R.L.R 288
6. *Krishnan vs The People* SCZ 19 of 2011
7. *People vs Yousouf Pandor and Bengula Beyani* (2010) 2 ZR 206
8. *Titus Zulu, Mike Musanya Sambundu vs The People* (2010) 1 ZR 450
9. *Oliver John Irwin vs The People* (1993-1994) ZR 7 (SC)

Legislation referred to:

The Penal Code, Chapter 87 of the Laws of Zambia
The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

1.0 INTRODUCTION

The applicant herein was convicted of the offence of uttering false documents contrary to *Section 352 of the Penal Code, Chapter 87 of the Laws of Zambia*, and obtaining pecuniary advantage by false pretences contrary to *Section 309A of the*

same *Act*. The applicant was sentenced to 2 years and 3 years respectively, to run concurrently. Being dissatisfied with the conviction and sentence, she lodged an appeal against the same, and consequently seeks to be granted bail pending appeal. This is a ruling in the applicant's application for bail pending appeal. The application is made by summons filed pursuant to *Section 332(1) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia*.

2.0 The Applicant's Affidavit in Support

The applicant filed an affidavit in support of the application wherein she deposed that Honourable I.T Wishimanga convicted her on one count of uttering false documents and one count of obtaining pecuniary advantage by false pretences. That she was sentenced to 2 years and 3 years respectively, but has since appealed against the conviction and sentence. She applied for bail pending appeal before the trial court but the same was denied. She is a Zambian national, a wife and mother who is of fixed abode and thus not a flight risk.

She was on bond during the trial and she abided by the conditions set in full. She is able to provide credible Zambian working sureties in adhering to any other conditions which this court may resolve to impose. Her appeal has a high likelihood of success because the trial magistrate made findings of fact which were not supported by evidence. That there is a risk that by the time her appeal is heard and judgment delivered, she would have served a substantial part of her sentence. The granting of the bail will not prejudice the respondent

2.1 The Applicant's Skeleton Arguments

The Applicant filed skeleton arguments wherein counsel argued that *Section 332(1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia* gives the court discretion to grant bail pending appeal. Counsel referred to a plethora of cases including **Kingstone Makungu vs The People**¹ and **Collin Robert vs the People**², that outline the conditions that must be taken into account by a court faced with an application of bail pending appeal. The conditions being:

1. A prima facie appearance that the appeal is likely to succeed;
2. Where there are exceptional circumstances disclosed by the applicant;
3. Where there is a risk that the sentence or a substantial part thereof will be served by the time the appeal is heard.

Counsel argued that the applicant qualifies to be admitted to bail as she satisfies the preconditions set out by the law. That her appeal has high prospects of success because the trial magistrate made findings of facts on assumptions and not evidence, and failed to consider evidence which would have exonerated the applicants. Counsel referred to the cases of **Weir Minerals Central Africa Limited vs Patrick Chisanga**³ and **Phiri & Others vs The People**⁴ to support the arguments. That appeals in the High Court take long due to the court's immense workload and hence there is a risk of the applicant serving a substantial part of the sentence by the time the appeal is heard. Counsel prayed that the applicant be granted bail pending appeal.

3.0 The Respondent's Affidavit in Opposition

The respondent filed an affidavit in opposition on 14th March, 2025 wherein Silvia Mutamina deposed that the claims by the applicant that she is of fixed abode, is not a flight risk and that she can raise sureties do not amount to exceptional circumstances for a convict to be admitted to bail pending appeal. There are preconditions prescribed by the law to be met by a convict before the court can grant bail pending appeal.

Paragraph 10 of the affidavit in support of the application has not disclosed exceptional circumstances to warrant this court granting bail pending appeal. Paragraph 11 of the affidavit in support offends the rules on affidavits, that appeals are being heard within a short period and this record is not voluminous to take long.

3.1 The Respondent's Skeleton Arguments

The respondent filed skeleton arguments wherein counsel argued that there are principles to be satisfied before the applicant can successfully be granted bail pending appeal as demonstrated in the case of **Stoddard vs The Queen**⁵ wherein it was held that bail pending appeal should not be granted unless exceptional circumstances are disclosed. That the foregoing case has been approved in our jurisdiction in a plethora of cases such as **Krishnan vs The People**⁶ and **The People vs Yousouf Pandor and Another**.⁷ Counsel argued that the applicant has not demonstrated exceptional circumstances for her to be admitted to bail pending appeal.

Further that the record only has one volume and hence there will be no delay in preparing a record of appeal and disposal of the appeal. That at this stage, the court is not called upon to determine the merits of the appeal but that the applicant must merely show that the appeal has high prospects of succeeding, which counsel argues the applicant herein has failed to do. That the lower court was on firm ground to deny the applicant bail pending appeal.

4.0 The Applicant's Affidavit in Reply

The applicant deposed to an affidavit in reply wherein she swore that her appeal having high prospects of success is an important factor for this court to consider in this application. The averment that appeals do not take long is denied. That the respondent is not in a position to state with absolute certainty the course which this appeal will take especially that it has been over four months after judgment in the lower court was delivered but the record of proceedings in the lower court, which the respondent claims not to be voluminous, is not yet ready. The respondent has not opposed the fact that the appeal, prima facie, has prospects of succeeding.

5.0 At the Hearing

6.1 The applicant's counsel relied entirely on the documents filed in support of the application.

6.2 The respondent's counsel equally relied on the documents filed in opposition.

6.0 Decision of the Court

I am indebted to counsel for the arguments which I have carefully considered. This application has been made pursuant to *Section 332 (1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia*, which provides:

"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."

As per the above section, the applicant clearly has a right to apply for bail pending appeal. However, the grant of bail pending appeal is treated with much circumspection. This is ably demonstrated in the case of **Titus Zulu, Mike Musanya Sambundu vs The People**⁸ where Justice Matibini 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."

Our courts have held that in determining a bail pending appeal application, there are five considerations to be taken into account as was outlined in the case of **Oliver John Irwin vs The People**.⁹ Justice Bwalya, stated in that case that

"In deciding a bail application, five considerations to be taken into account are clearly spelt out in Archibold, 36th edition and amplified

in the case of the State v Gopolong Makcenzie and these read as follows:

- i. the nature of the accusation against the applicant and the severity of the punishment which may be imposed;
- ii. the nature of the evidence in support of the charge;
- iii. the independence of sureties if bail were to be granted;
- iv. the prejudice to the applicant (accused) if he is not admitted to bail;
- v. the prejudice to the State if bail is granted.”

The court went on to guide in the **Irwin** case, that the foregoing conditions do not bar an applicant from raising any other special circumstances peculiar to that particular applicant. Special or exceptional circumstance has been aptly described in the **Krishnan** case wherein the Supreme Court stated that:

“It is settled law that bail is granted at the discretion of the Court. For bail pending appeal to be granted, the Court must be satisfied that there are exceptional circumstances that are disclosed in the application. The fact that the appellant, due to delay in determining his appeal, may have served a substantial part of his sentence by the time his appeal is heard is one such exceptional circumstance. For example, in the Kayumba v The People case, the appellant was sentenced to two years imprisonment and this was considered a short period such that by the time his appeal was heard, he would have served his sentence, hence the admission of the appellant to bail pending appeal. We must point out that each case is considered on its merits, depending on what may, be presented as exceptional circumstances. For example, if the Record of Appeal is voluminous and could take months to prepare, this can be considered an exceptional circumstance having regard to the length of the sentence.”

Further, **The People vs Yousuf Pandor and Bengula Beyanio** case is also instructive as Justice Matibini in that case held:

"The exceptional or unusual circumstances 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."

Applying these principles to the facts of this case, I have deliberated over the grounds of appeal indicated in the notice of appeal exhibited in the affidavit in support of this application and note generally that they pertain to findings of fact. Without delving into the merits of the case, it is trite that appellate Courts do not overturn findings of fact unless the same are perverse on this basis. I am not satisfied that the appeal is likely to succeed. The applicant has also argued that she will provide Zambian working sureties, is of fixed abode, that she did not breach the bail conditions of the court below and that she will abide by the bail conditions set out by this court. In considering these arguments, the applicant has not provided this court with evidence of those working sureties to assess. Additionally, the Supreme Court in the **Krishnan** case has guided that:

"The fact that an applicant did not breach the bail conditions in the court below is not an exceptional circumstance which warrants admitting an applicant to bail pending appeal."

Having gone through the record, there are no exceptional circumstances to warrant admitting the applicant to bail. As regards the argument that the applicant will have served a substantial part of the sentence by the time the bail application is heard, I take judicial notice of the fact that currently appeals are being heard more expeditiously as there is a deliberate effort by the Judiciary to dismantle all cases in back-log moreso in criminal matters. I further agree with the respondent that this is not a voluminous record and hence should be disposed of timely.

In relation to the prejudice that will be suffered by the State, I am of the considered view that the State will suffer prejudice, as it successfully prosecuted the matter in the court below by securing a conviction and sentence. The granting of bail at this stage, will no doubt negatively send a message that would be perpetrators will most likely not be punished for the commission of similar offences. The net effect is that the application for bail pending appeal is denied and the application consequently dismissed.

Dated the day of 2025.

19th
May
REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
19 MAY 2025
R. CHIBBABBUKA, J
P.O. BOX 50067, LUSAKA
R. CHIBBABBUKA
HIGH COURT JUDGE