

IT



IN THE HIGH COURT FOR ZAMBIA HPBA/42/2024
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

ELIAS BANDA

AND

THE PEOPLE

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 03RD OCTOBER, 2024 - IN CHAMBERS

For the Appellant : *Mr. V. Choongo, Principle State Advocate – National Prosecutions Authority*
For the Respondent : *Mr. Elias Banda – In Person*

RULING

On the 6th September, 2024 the Applicant filed an ex-parte summons for Variation of Bail Conditions pursuant to **section 126(3) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia.**

Filed on the same date was an affidavit in support deposed to by Elias Banda. He deposed as follows:

- 1. That he was arrested and charged with three counts of theft by agent. As proof he produced the charge sheet. In count 1 the statement of offence is Theft of Motor Vehicle contrary to section 281A of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of offence were that ELIAS BANDA on the unknown*

dates but between the 1st September, 2022 and the 31st October, 2022 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did steal a motor vehicle namely VITZ unregistered of Chasis number SCP90-5001350 valued at K90,000.00 the property of **ELIAS KAMUNDI**.

2. In count 2 the statement of offence is Theft by agent contrary to section 280(b) of the Penal code Chapter 87 of the Laws of Zambia. The particulars of offence were that ELIAS BANDA, on the 14th June, 2022 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did steal K260,000.00 cash which was entrusted to him by **GREEN CHELWA** to buy two mini buses on his behalf and return the proceeds thereof.
3. And count 3 the statement of offence is Theft by Agent contrary to section 280(b) of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of the offence were that ELIAS BANDA, on 9th September, 2023 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did steal K118,500.00 cash which was entrusted to him by **SUZYO KILEMBE** to buy a Land Rover Discovery on his behalf and deliver the same thereof.

That on the day he appeared before the Subordinate Court he took plea and also applied for bail.

That sometime in July, 2024 he was granted cash bail in the sum of eighty thousand Kwacha (K80,000.00).

That he was of the view that the sum of eighty thousand kwacha is too excessive an amount which he was unable to raise.

That this court has powers to vary the bail conditions imposed. He sought the indulgence of this court to vary the bail conditions.

On the 1st October, 2024 when the matter came up before me Mr. V. Choongo Senior State Advocate based at the National prosecution Authority applied for an adjournment. He informed the Court that he intended to file an affidavit in opposition. That this can only be done after he consultations with the arresting officer in this matter. This application came after the Court decided that the application would be heard inter parte.

On the 3rd October, 2024 the State filed an affidavit in opposition to the affidavit in support of summons for variation of bail pending trial. State Counsel for the State re-confirmed that the Applicant is charged with three counts, namely of Theft of motor vehicle and two counts of Theft by Agent.

That he was appearing before Honourable Masoja for the said offences at the Lusaka Subordinate Court.

That according to the arresting officer namely, Detective Constable Muwela of Woodlands Police Station, he informed the Court below during the proceeding that the Applicant had been illusive for two (2) years before he was apprehended in Solwezi in the North Western Province and brought to Court.

That according to the aforesaid record of proceedings, the Applicant has a tendency of not attending Court hearings while he is in custody by not responding to his name when called upon, thereby delaying the trial.

That if the bail conditions given by the Court below are varied, there is no guarantee that the Applicant will attend court hearings.

That, if the conditions for bail are varied, the State will suffer prejudice in the prosecution of the substantive matter.

On the 21st October, 2024 the Applicant filed a further affidavit in support of ex-parte summons for variation of bail conditions.

That he has been receiving medical treatment from the time of his arrest and it has been a challenge for him to go to the hospital because sometimes the dates of going to court and the date for going to the hospital for reviews would clash.

Produced were Ministry of Health documents as proof that he was receiving medical attention.

Bail pending trial should normally be allowed with great freedom for bailable offences. The reason why this is so is because an accused person is presumed to be innocent until he is convicted.

Detention pending trial is normally justifiable only if it is likely that an accused person will fail to surrender himself/herself for trial.

Before bail is granted the Court will consider the following:

- 1. The nature and seriousness of the offence: The severity of the crime and its impact on the victim and society.*
- 2. Flight risk: The likelihood that the accused will flee the jurisdiction or fail to appear for trial.*
- 3. Risk to public safety: Whether releasing the accused poses a threat to the community.*

Further the Courts consider:

- 1. The accused's character and reputation*
- 2. The accused's prior record if any and would include previous convictions, bail violations or failure to appear in court when required.*

3. *The Court where bail is applied for the first time would also consider the strength of the prosecution's case: The likelihood of conviction and potential sentence.*
4. *Length of time in custody: The duration of pre-trial detention.*
5. The accused's health and medical needs.

The conditions imposed aim to balance the accused's right to freedom with the need to ensure public safety and the integrity of the judicial process.

I would like to believe that although the amount imposed may be considered excessive that the Magistrate who has a discretion in the matter of bail exercised his/her discretion judiciously, unfortunately the record is not before me to enable me know the reasons for imposing the conditions which the Learned Magistrate imposed.

I have noted that the accused does not disclose in his affidavit that he is of fixed abode. The Court has taken into consideration that for two years the accused has been elusive meaning there was a failure on his part to appear in Court when required. That his absence delayed the State in bringing him to Court. The failure to disclose his home address can be understood to mean that he is of no fixed abode. That the likelihood of the accused fleeing or failing to appear for trial is high.

For reasons not known to the Court because the record from the Subordinate Court was not before me in order for me to understand how the Court arrived at his decision. I have however, relied heavily on the information obtained by the State from the arresting officer. I am of the view that the conditions imposed and brought to my attention are aimed at balancing the accused's right to freedom with the need to ensure the integrity of the judicial process.

The application to vary the bail conditions imposed by the court below is hereby denied.

For avoidance of doubt the cash bail of eighty thousand kwacha (K80,000.00) still stands. Accused is remanded in custody until the bail conditions imposed by the Court below are satisfied.

DELIVERED AT LUSAKA THIS 30TH DAY OF JANUARY, 2025.


G.C.M CHAWATAMA
HIGH COURT JUDGE