

WILLARD CHIDAMBO MASEKO
and
DONNA MTENJWA MASEKO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 6 August 2014 and 19 August 2014

Bail pending appeal

K Maeresera, for the applicant
R Chikosha, for the respondent

MATANDA-MOYO J: This is an appeal against a magistrate's decision refusing to suspend the operation of sentence pending determination of an appeal.

The brief facts are that the applicants were tried and convicted of fraud in contravention of s 136 of the Criminal Law (Codification and Reform) Act [*Cap* 9:23]. They were sentenced to 24 months imprisonment of which 6 months were suspended on good behaviour. A further 8 months imprisonment was suspended on condition of restitution. The remaining 10 months were suspended on condition applicants completes 350 hours of community service at ZRP Mabelreign and ZRP Primary School respectively. The applicants applied for the suspension of community service and payment of restitution pending appeal. The application was heard by a magistrate on 19 June 2014. The application was dismissed leading to applicant filing this appeal. The appeal was set down before a judge in the bail Court. The question falling determination is whether such an appeal is determinable by a single judge hearing bail application or whether the appeal should be determined as a proper appeal set down before two judges of the High Court.

It is common cause the High Court is sitting as an appeal court in determining whether the trial magistrate erred in denying appellant the relief sought.

Appellant submitted that an appeal of this nature should be heard in the same manner as that which is heard after a decision made in terms of s 63 (b) (i), that is where an accused person appeals against the granting of bail pending appeal by a magistrate. An accused person whose bail has been refused has a right of appeal in terms of s 121 of the Criminal Procedure and Evidence Act and such appeal is heard in the bail Court.

I am of the view that this appeal is akin to an appeal where bail has been refused by a magistrate.

Community service form part of the sentencing options in our jurisdiction. It is a form of restriction imposed on an accused person who has been found guilty of committing an offence. When an accused person seeks for suspension of the sentence of community service, all the accused is saying is that, the court should suspend the operation of the sentence of community service until his appeal is determined. Equally so when he is seeking suspension of payment of restitution. I can liken this process to bail pending appeal. I say so after carefully scrutinising s 63 of the magistrates Court Act [*Cap 7:10*] which provides;

- “63. Execution of sentence of imprisonment, fine or community service not suspended pending review or appeal unless bail is granted.
The execution of any sentence of imprisonment or a fine or community service shall not be suspended by:-
- (a) -----
 - (b) The noting of an appeal referred to in section sixty;
unless-
 - (i) -----
 - (ii) In the case of community service, an application is granted by the magistrate to suspend the operations of the sentence pending determination of the appeal.”

The above provisions appear under the same heading, meaning the two fall in the same class and the procedures used in dealing with such applications are the same.

Section 21 of the Criminal Procedure and Evidence Act [*Cap 9:07*] deals with appeals regarding bail application. Section 121 (2) (b) provides;

- “(2) An appeal in terms of subsection (1) against a decision of-
- (b) a magistrate, shall be made to a judge of the High Court!” (my own underlining)

I understand the above section to be referring to appeals against the magistrate’s decision made in terms of s 63 of the Magistrates Court Act cited above. Such appeals lie to a single judge of the High Court.

At this stage the court is not dealing with the substantive appeal. The court is merely looking at whether an appeal court is likely to set aside the conviction and sentence. (Community service and restitution forms part of sentence). This is not the sort of appeal to be determined by two judges of the High Court. As reiterated above, this appeal is akin to an appeal against refusal of bail by a magistrate.

I share the same views as expressed by MATHONSI J in *Gumisai and Others v State* HH 177/12 that community service is a deprivation of liberty just like imprisonment. The bail court is thus the right court to entertain such an appeal. Obviously, this type of appeal as an appeal against refusal of bail by a magistrate must be speedily resolved. If treated as an ordinary appeal there is a real likelihood that by the time the appeal is heard, the appellants would have completed the punishment. This is just a reprieve between the present and the time the appeal is heard so as to avoid punishing individuals whose appeals enjoy good prospects of success.

Accordingly the Bail Court is the proper court to deal with such appeal. The court has powers to rehear the application afresh. Since the application is not opposed and rightly so I hereby grant the order sought as follows:

- 1) The performance of community service and payment of restitution by the appellants be and is hereby suspended pending determination of the appeal in case No. CA 515/14.

Maeresera & Partners, appellant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners