NESBERT MUSANA
and
KIVEN DZIKAMAI
and
TINASHE SAUNGWEME
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 and 25 November 2015

Bail Pending Trial

N Mugiya, for applicants
D Chesa, for respondent

TAGU J: This is an application for bail pending trial. The three applicants were arrested sometime in January 2010. They appeared at Harare Magistrates Court facing Murder charges as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They were jointly charged with two other accused namely, Valentine Mupotole and Robin Ndlovu. The allegations being that on 20 January 2010 and at Ushewokunze Housing Co-operative office, Waterfalls, Harare the accused persons unlawfully caused the death of Eric Chaora by striking him with open hands, hosepipe and sjambok several times all over his body realizing that there was a real risk or possibility that their conduct might cause death and continued to engage in that conduct despite the risk or possibility, thereby causing injuries from which the said Eric Chaora died.

The applicants applied for and were granted bail pending trial by this Honourable Court and they had been abiding by their bail conditions. However, on a date and before a court not stated by the applicants, and for reasons not stated by the applicants, they were removed from remand. However, the applicants later appeared in Court at Harare Magistrates Court on 12 October 2015 wherein they were indicted for their trial before the High Court in terms of sections 65 and 66 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The

applicants were consequently remanded in custody. The trial failed to kick off on the scheduled date and the matter has been postponed to 25 November 2015 for trial.

The applicants have now approached this Honourable Court with this present application for bail pending their trial. The applicants want to be remanded out of custody or on $100.00 bail each. They attacked their detention on the basis that it is unlawful and wrongful in that at the time the applicants were indicted, they had been removed from remand in terms of s 320 of the Criminal Procedure and Evidence Act. They submitted that the Magistrate erred when he ordered that the applicants be detained in custody upon their indictment as that is contrary to the provisions of s 322 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Mr *Norman Mugiya* who appeared on behalf of the applicants argued that the Magistrate ought to have, upon indictment of the applicants, remanded them out of custody to their trial date. According to him the only remedy *in casu* is to release the applicants on their own recognizance to their trial date.

The application is strongly opposed by the respondent.

Mr *D. Chesa* who appeared on behalf of the respondent submitted that the applicants were put back in custody following their indictment for trial in the High Court in terms of s 66 of the Criminal Procedure and Evidence Act on 12 October 2015. He said the trial of the matter has failed on numerous occasions after applicants were not located for them to be indicted. The trial involves five accused persons. Recently on 28 September 2015 the trial failed to commence after the applicants were not located and only present were fourth and fifth accused, that is, Valentine Mupotole and Robin Ndlovu were available. The applicants were only arrested following a tip off from the relatives of the other accused persons. Further, he stated that the State is impatient to have the matter finalised and all the previous failures have been caused by the applicants. Mr D Chesa urged the court to note that the other accused Robin Ndlovu case B 816/15 had bail denied by this court hence there is no reason to treat the applicants differently from their counterpart. Further, the applicants have already filed their defence outlines through their Legal Practitioner of choice, Chitumba Law Chambers. The State counsel and the legal practitioner have met and mapped the way forward before the applicants changed and engaged the current lawyer Mr *Mugiya*. What the respondent is concerned with is the vacillating attitude of the applicants towards finalization of the matter, and this has created an uncertainty that they will avail themselves for the trial on 25 November 2015 if they are admitted to bail. This view is supported by the difficulties the State had in having them arrested for trial.

Mr *Mugiya* did not dispute the submissions by Mr D *Chesa* that trials failed in the past due to the conduct of the applicants. He insisted that the applicants should not have been remanded in custody in terms of sections 320 and 322 of the Code.

Two questions arise for determination. The first is whether the applicants were removed from remand in terms of s 320 or not, and whether they should have been indicted out of custody in terms of s 322 or not.

Section 320 says-

> **"320 Dismissal of charge in default of prosecution**
>
> (1) If the prosecutor, whether public or private, does not appear on the court day appointed for trial, the accused may move the court to discharge him, and the indictment, summons or charge may be dismissed and, when the accused or any other person on his behalf has been bound by recognizance for the appearance of the accused so to take his trial, may further move the court that such recognizance be discharged, and such recognizance may thereupon be discharged."

In casu Mr *Mugiya* did not state that the applicants were discharged in terms of s 320 because the prosecutor failed to appear on the court day appointed for the trial of the applicants at the High Court for murder. The applicants were never indicted before the High Court prior to 12 October 2015. If ever they were removed from remand it was for some other reasons which the applicants did not bother to state. Otherwise Mr *Mugiya* could have challenged the submissions by Mr *D Chesa* that trials failed previously because the applicants could not be located. The submission by Mr *Mugiya* that the applicants were removed from remand in terms of s 320 of the Code is just a figment of his own imagination and is unsubstantiated. I find that the applicants were not removed from remand in terms of s 320.

Section 322 governs further proceedings against accused discharged for want of prosecution or whose recognizance has expired. It says-

> **"322 Further proceedings against accused discharged for want of prosecution or whose recognizance has expired**
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> (1) A person who –
> (a) has been discharged in terms of section three hundred and twenty-one for want of prosecution; or
> (b) has been admitted to bail but not duly brought to trial;
>
> may be brought to trial in any competent court for any offence for which he was formerly committed to prison or admitted to bail at an time before the period of prescription for the offence has run out:
>
> provided that, subject to subs (2), a person referred to in -

(a) paragraph (a) or (b) of this subsection shall not be liable to be committed to custody; or
(b) paragraph (b) of this subsection shall not be liable to find further bail; in respect of proceedings for an offence referred to in this subsection.

(2) A person referred to in subs (1) who was committed for trial for an offence referred to in that subsection may be prosecuted by the Attorney –General before the High Court for that offence, and if that person, having been duly served with an indictment and notice of trial, fails to appear at the time mentioned in such notice, the court may, on the application of the Attorney- General, issue a warrant for his arrest and detention in prison until he can be brought to trial or until he finds bail for his appearance to stand his trial on the said indictment".

In my view if it had been proved that the applicants had been removed from remand in terms of s 320 then they were not supposed to be remanded in custody in terms of s 322. In the current case there was nothing untoward that the Magistrate did by remanding the applicants in custody. The attack on the magistrate is unwarranted. It was proper for the magistrate to indict them in custody in terms of s 66 of the Code.

What the applicants should simply do is to apply for bail pending trial without invoking the provisions of s 322. The issue to be decided is whether the applicants are proper candidates for bail pending trial or not. I am persuaded by the arguments by Mr *D Chesa* that the conduct of the applicants is hindering the finalization of the matter. For example, one of the accused Robin Ndlovu has failed to show any form of interest in having the matter finalized by not providing his defence outline by 12 October 2015 despite having been arrested on 9 September 2015. Further, Robin Ndlovu applied for bail pending trial before this court and the application was dismissed in case B816/15. There are no compelling reasons to treat these applicants differently from their counterpart. The circumstances of this case warrants that the applicants be kept in custody until 25 November 2015 when their trial is scheduled to commence.

In the circumstances I make the following order-

The application for bail pending trial is hereby dismissed.

Mugiya & Macharaga Law Chambers, applicants' legal practitioners
National Prosecuting Authority, respondent's counsels.