

JUSTICE MATSIKA

AND

TAKESURE MATONZI

AND

TRYMORE MATONZI

AND

TAWANDA MATONZI

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 30 JUNE 2010 AND 1 JULY 2010

Mr. M. Makonese for applicants

Mr. Hove for respondent

Judgment

MATHONSI J: The four Applicants, along with a juvenile Claytose Moyo were convicted of 1 count of stocktheft by the magistrates' court of Kwekwe on the 14th August 2009. The four of them were sentenced to an effective 13 years imprisonment after the court found no special circumstances in the matter.

Prior to that, on the 18th May 2009 the second Applicant, along with two others namely

George Masunda and Melusi Shepherd Mukwananzi, had been convicted of another count of stocktheft and sentenced to an effective 10 years imprisonment. That case came before me as a bail application pending appeal under case No. HCB 131/09.

On the 27th May 2009 again the same magistrates Court convicted second, third and fourth Applicant of stocktheft and sentenced them to the mandatory 9 years imprisonment after finding no special circumstances. In that case they were jointly charged with George Masunda, a police officer and Melusi Shepherd Mukwananzi. That matter came before this court as a bail application pending appeal under case no. HCB 130/09.

In the case before me, the Applicants are alleged to have stolen an ox and a bull from Bonaccord grazing lands which belonged to Trust Mapiye on the 20th February 2009. They allegedly drove the animals to Zetfan Farm in Redcliff where they slaughtered and skinned them before hiring someone to ferry the meat to Shoppers Butchery in Redcliff where it was cut into pieces for sale.

The first Applicant is a constable in the Zimbabwe Republic Police and at the material time he was stationed at Redcliff police station. The rest of the Applicants are unemployed members of the same family.

State witness Blessing Mutende, who ferried the meat of one of the slaughtered beasts to Shoppers Butchery in Redcliff placed all the Applicants at the scene of the crime and his evidence was virtually unchallenged in its entirety. According to this witness he knows all the Applicants well. He was approached by first and second Applicants who requested him to ferry

their meat from some farm to Redcliff. He proceeded with first and second Applicants to the place where he then met the third and fourth Applicants together with Claytose Moyo who was the fifth accused at the trial. The latter three loaded the meat into his vehicle and when they did so they were collecting it from some distance using a footpath.

The meat was conveyed to Shoppers Butchery in Redcliff where it was cut into pieces by Musa Dondo who also testified in court corroborating the testimony of Mutende. Dondo added that within a period of two weeks the Applicants had brought two beasts for cutting. Another state witness, Trust Mapiye testified to the effect that the hide of one of his beasts had been found at the scene where the Applicants had loaded the meat onto Mutende's vehicle.

The Applicant's defence that the beast belonged to their father who had sold it to one Khumalo of South Africa and that they only facilitated the slaughter and cutting of the meat suffered a stillbirth when they could not produce their father to substantiate their claims. No meaningful explanation was proffered for their inability to do so and the court was at large to draw adverse inferences against them.

In all circumstance, the evidence against the Applicants is very strong. In an application of this nature, the court must have regard, in the main, to the seriousness of the offence for which an applicant for bail stands convicted, the gravity of the penalty imposed and the prospects of success of the appeal in determining the possibility of prejudice to the administration of justice. Ultimately the court will lean in favour of liberty where this will not endanger the interests of the administration of justice. *S v Williams* 1980 ZLR 466 (A).

In the case before me the Applicants have been convicted of a serious offence which carries a minimum mandatory sentence of 9 years. No special circumstances were found as would point to a lighter sentence. They have been sentenced to a lengthy term of incarceration and they have extremely dim prospects of success on the merits of the appeal. For these reasons the motivation for abscondment in order to evade justice is very high. This is especially so when all this is considered against the backdrop of the other convictions and sentences meted against second, third and fourth Applicants.

I am not satisfied that the administration of justice will not be prejudiced by the admission of the Applicants to bail pending appeal.

Mr. Makonese who appeared for all the Applicants asked that the application of the fourth Applicant Tawanda Matonzi be treated differently for medical reasons. Although he did not have a medical certificate to back him up, he submitted that the said Applicant was very ill and his condition had deteriorated badly. In response *Mr. Hove* for the Respondent requested to be given an opportunity to investigate fourth Applicant's condition as the state's attitude to his application would be different if that is verified.

Mr. Hove has since submitted a letter dated 29th June 2010 which reads as follows:-

"The Attorney-Genral's Office
Tredgold Building
3rd Floor, Office 311B
Bulawayo

29th of June 2010

The Registrar
High Court of Zimbabwe
Bulawayo

REF: BAIL PENDING APPEAL: HCB 132/09 JUSTICE MATSIKA AND THREE OTHERS.

The above subject matter refers. The defence for the applicants in the above matter indicated to both the state and the Judge during the bail hearing on the 29th instant that one of the applicants, namely Tawanda Matonzi is very 'sick'. The state was called upon to indicate its attitude towards the granting of bail in respect of the applicant. The state indicated that it could change its attitude if indeed applicant is 'sick'. To that end, the state was tasked by the court to verify applicant's claim. The state has made frantic efforts to locate the Officer in Charge Kwekwe Prison, to no avail. Consequently, the state has failed to verify applicant's claim that he is very 'sick'. In the absence of confirmatory information from the medical personnel at Kwekwe Prison that applicant is indeed 'sick', the state is left with no option, but to maintain its stance that applicant is not a proper candidate for bail, hence bail should be denied.

(Signed)
T. Hove
Attorney General's Office
Bulawayo"

What I am left with therefore is the submission by *Mr Makonese* that the fourth Applicant is critically ill which has not been refuted and the Respondent's position that if this were true, it would consent to bail. I have no reason to disbelieve counsel for the Applicants and for that reason I would grant the fourth Applicant bail.

In the result, it is ordered that:-

1. The application for bail by the first, second and third Applicants be and is hereby dismissed.
2. The fourth Applicant (Tawanda Matonzi) be and is hereby granted bail pending appeal on conditions:-

- 2.1 He deposits the sum of US\$50-00 with the Clerk of Court, Kwekwe Magistrates Court.
- 2.2 He resides at House Number C145 Torwood, Redcliff until the appeal is finalised
- 2.3 He reports once very fortnight at Zimbabwe Republic Police Redcliff between 6am and 6pm.

Mathonsi J.....

Makonese and Partners, applicants' legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners